

**Crossing the Wires:
The Interface between Law and Accounting and the Discourse Theory Potential of
Telecommunications Regulation**

By

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A thesis
Submitted to the Victoria University of Wellington
in fulfilment of the requirements for the degree of
Doctor of Philosophy
in Accounting

Victoria University of Wellington

2008

- Abstract -

Regulating telecommunications is complex: international experience indicates that there is no 'successful' regulatory framework due to the balancing of industry and regulatory interests (Laffont & Tirole, 2000, p. 13). The New Zealand 'light-handed' regulatory experiment failed and the 1999 General Election presented an opportunity for change in telecommunications. The Labour-led Government in implementing a policy of 'responsible re-regulation' enacted the Telecommunications Act 2001, signalling the passage of "landmark telecommunications legislation ..." (Swain, 2001d).

Within the Telecommunications Act 2001, 'cost' assumed a central regulatory role. It is this move to cost that this thesis considers in identifying, developing, and critiquing the interface of law and accounting. The thesis examines the increasing call for accounting information in law and regulation by interrogating the use, presentation, and reception of accounting to examine the interface between law and cost in the regulation of telecommunications. The Telecommunications Act 2001 incorporates total service long run incremental costing as the 'costing technique' for interconnection access and annual net costing for the Telecommunications Service Obligation. Through interrogating 'cost' as an accounting technology, in contrast to the economic and legal conception of cost as a simple, objective concept, the thesis illustrates the role of cost at methodological, technical, and political levels, and the challenges that this poses for telecommunications regulation.

The thesis articulates the relevance of discourse theory to the interface of law and accounting. Consequently, the thesis investigates the formation and discursive enunciation of standpoints of political identities characterised by antagonism and uncertainty. This includes identifying attempts by interested parties, including industry actors, stakeholders, and the Government and its agents, to articulate 'new' discourses centred on nodal points around 'cost'. The rhetorical analysis examines how actors articulate the metaphorical element of 'cost' in agitating for particular costing methods to be included in the legislation. The empirical analysis examines the process of rhetorical condensation as arguments for and against the incorporation of total service long run incremental costing and net costing came to signify the complete failure of the light-handed regulation. Then, by examining the politics following the enactment of legislation, this condensation is unpacked. The analysis of the contestation over interpreting and implementing the regulation illustrates displacement of the 'common' signifier resulting in confusion and disappointment in relation to the aims of the new regulatory regime.

- Acknowledgements -

“Dear David,
Hope you finish your PhD – whatever it is”

Invariably, this paragraph will not express my sincere gratitude to every person who has helped me.

Thank you to the School of Accounting and Commercial Law at Victoria University of Wellington and the Department of Government at the University of Essex for the opportunity. Thanks to the New Zealand Institute of Chartered Accountants and the Competition Law and Policy Institute of New Zealand for scholarship support. In particular, to my “academic idols”, Professor Judy Brown and Associate Professor Geoff McLay: both encouraged me to ask questions, to always ask ‘why’, and it is in this spirit that I conducted this work. Thank you deeply, your advice, support, and encouragement has been invaluable.

To my supervisors, Professor Trevor Hopper (Rhinos) and Dr Robert Deuchars (Celtic), thank you so much for your encouragement in this challenge: thank you for seeing it in me. Thank you for the friendship that we have developed over the years, and for guiding me and providing me with the space to explore. Equally, for opening their home to me, genuine thanks go to Trevor and Denise.

Personally, to friends and family, I thank and love you for your support. To my father, thank you for pushing the horizons to allow me to aim high. To my mother, thank you for unwavering support. To my parents-in-law, thank you for your understanding, support and encouragement. To my sister, brother-in-law, and to my nieces (who are responsible for the above quote: I’ll explain what it is all about later, but not for quite a while), your support has been appreciated.

Finally, to my dear wife, Erene, all my love and thanks go to you. Without your understanding, support, and space, this thesis would not be completed. You are part of each chapter, page, sentence, and word.

Cheers,

David Carter

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- Chapter One -

Introduction

Regulating telecommunications is complex: international experience indicates that there is no ‘successful’ regulatory framework due to the balancing of industry and regulatory interests, as competitors require network interconnection for landlines, tolls, cellular telephony, Internet service provision [ISP], and cable television (Laffont & Tirole, 2000, p. 13).¹ This degree of network interdependence tends to promote natural monopolies. Due to society’s reliance on telecommunications, there is an important social welfare component: society’s access and the ability to enjoy telecommunications depends on effective regulation (Ministerial Inquiry into Telecommunications [MIT]², 2000d, p. 11).

During the Fourth Labour Government’s (1984-1990) liberalisation and privatisation of State assets, New Zealand [NZ] introduced the competition law ‘experiment’ of “light-handed regulation”. For telecommunications, this involved business separation, information disclosure, the anti-competitive rules of the Commerce Act 1986, Commerce Commission [CC] enforcement, an expectation that new entrants would pursue legal remedies, and threatened further regulation if the incumbent ‘misbehaved’. However, by the late 1990s, the light-handed approach failed for Telecommunications, as Telecom, the dominant incumbent, hindered competitive development by controlling access to the network. The judiciary produced indistinct outcomes, struggling with the complexity of telecommunications regulation, resulting in the Privy Council approving the recoupment of ‘monopoly rents’ in interconnection pricing. There was limited competition, characterised by stagnating retail prices and limited adoption of new technology. NZ’s telecommunications was ranked amongst the

¹ A further complication is the degree of technological change in telecommunications.

² Note the list of abbreviations in the appendices.

most expensive and least developed of 32 Organisation for Economic Co-operation and Development [OECD] nations. Consequently, disquiet about the Government's ability to control Telecom and manage competition law increased.

The 1999 General Election presented an opportunity for new regulatory direction. The Labour-led coalition Government, elected on a platform of 'responsible re-regulation', reconstituted commercial regulation by increasing the powers of the CC and Securities Commission, regulating Charities, and introducing an electricity sector regulator. In telecommunications, the Government established the MIT. Following extensive consultation with stakeholders, the MIT's final report identified two core regulatory issues: interconnection access to Telecom's PSTN and the Telecom's Kiwi Share Obligation [KSO].³

In identifying international interconnection pricing methodologies, the MIT recommended cost-plus total service long run incremental costing [TSLRIC] with the establishment of an independent regulator to determine final prices. In considering the KSO, the inquiry focused on whether Telecom should recoup costs of providing the KSO from industry participants. The MIT argued against recoupment, as Telecom's shareholders accepted the burden of the KSO at privatisation.

The Government's Telecommunications Act 2001 [TA] accepted the MIT's TSLRIC recommendation, but ignored the KSO advice by enacting a net costing model where Telecom would recoup KSO costs from industry participants. Then implementation. This is where I began to interact with telecommunications regulation. My honours dissertation in law argued that the TA failed to deal with Telecom's underlining economic incentives to inhibit the development of competition, by focusing

³ This is a form of universal service obligation requiring Telecom to maintain residential local free calling, to cap the price for residential line rental, to ensure comparability in service performance between rural and urban residential users, and to ensure the availability of residential services.

on anti-competitive and not anti-developmental behaviour. Chapman Tripp, a law firm holding a contract with Telecom, employed me to their regulation team. Thus, I was involved in the implementation of the TA, experiencing the ‘coal face’ interface of law and accounting: a political strategic interaction between law, accounting, regulation, and telecommunications.

The TA introduced sector-specific regulation, focusing on: a) dispute resolution for interconnection access to Telecom’s national network based on TSLRIC; and b) providing a transparent, competitively neutral system for the KSO, requiring an annual net costing. Of interest is the TA’s increasing reliance on accounting information, as cost assumes a central regulatory role. This thesis concentrates on the interface between law and accounting in a regulatory setting at the discursive level by examining the articulation of cost by interested parties in the institution of, and within, the TA’s regulatory framework. Consequently, this thesis concentrates on a series of questions:

- 1) What is the interface between accounting and law? Specifically, what is the role of accounting in telecommunications regulation? What is the role of cost and cost theory within a regulatory framework?

As law and regulation increasingly call on accounting to provide information for their processes, for what purpose is the information used, how it is used, and how it is presented and received?

- 2) What are the insights of Laclau and Mouffe’s discourse theory [DT] in moving from costing as technical to costing as political? In particular, what insights emerge from Glynos and Howarth’s logics of critical explanation?

Adopting a post-Marxist, post-structuralist theoretical framework is deliberate. Conventional forms of analysis, such as economic regulatory theory or Marxism fail to capture the complexity of the multi-layered political games involved in this exploratory, interdisciplinary research. Marxist accounts provide little leverage in accounting for contemporary society, as ‘critical’ interventions tend to be motivated by singular

universals, such as labour, gender, or race, which portray an over-simplified ‘picture’ of a complex world and dichotomously exclude community members from the struggle. Second, traditional economic regulatory theory tends to ignore the linguistic turn. As law and accounting are linguistic practices focusing on persuasion, DT considers rhetorical strategies that illustrate contestation and the limits of language. Third, ‘politics’ exists: “We can say, then, that a post-structuralist approach to politics points always to a certain void that makes social and political identities indeterminate (Newman, 2005, p. 154).

The thesis is presented unusually as much of the empirical research and analysis of the economics of NZ’s telecommunication regulation and the associated legal and cost issues are in early chapters. This enriches the early contextual detail and helps the ease of exposition as this lays the ground for subsequent DT analysis and marks the point of departure from more conventional economic and legal analyses. The thesis divides into two sections. The first section introduces each of the main theoretical influences: regulation, telecommunications, (cost) accounting, law, paradigmatic research, and DT. Chapter two considers the complexity of telecommunications regulation, by examining the insights and limitations of dominant economic regulatory theories with respect to the genealogical analysis of NZ’s regulation. In part, the chapter depicts the shift from the market-based, light-handed regulatory model to the current sector-specific framework. The chapter examines insights and challenges of Chicago and Harvard school economics, capture theory, and public interest regulation as they are implicated in NZ’s regulatory approaches. The chapter concludes that the limits of economic regulatory theory illustrate the need to move beyond current constraints to tell a richer story of the complexity of telecommunications regulation. Chapter three considers the interface between accounting and law. This chapter empirically canvasses the regulatory reliance on accounting in telecommunications. In illustrating the

challenge of the interface of law and accounting in telecommunications regulation, this chapter characterises the problems of costing from an economic perspective. While this thesis is not economic in nature, the economic lens provides a framework to illustrate the arbitrariness of the employment of cost as a regulatory tool. The chapter illustrates the role of choice, arbitrariness, and conditionality within conceptions of traditional economic cost in arguing for an analytical framework that embraces the role of accounting at methodological, technical, and political levels. In incorporating cost into telecommunications regulation, public policy makers, Government, lawyers and economists tend to assume a simplistic, positivistic notion of cost. For an accountant, this is problematic as cost is complex due to issues of arbitrariness, choice, contestability, social and institutional constructionism, politics, and subjectivity. Consequently, the thesis examines the interface of law and accounting by problematising the role of cost in telecommunications regulation, as cost shifts from the technical to the political. Chapter four reflects on the current state of paradigmatic research within law and accounting by comparing and contrasting the paradigms of positivism, interpretivism, and critical theory. Chapter four suggests the limitations of current paradigms render them unsuitable in dealing with the complex range of issues identified in Chapters two and three, and that the uncertainty and antagonism invites post-structural analysis. Chapter five presents Laclau and Mouffe's DT. The chapter develops the central concepts of DT, highlighting the relevance of these concepts for interrogating the interface of law and accounting in telecommunications regulation.

The second section develops the theoretical and empirical material introduced in the first section. Chapter six examines Glynos and Howarth's logics of critical explanation in answer to the perceived normative and methodological limitations of DT, by characterising the social, political, and fantasmatic logics. In terms of research methods and data collection, the chapter canvasses interviews, document analysis,

dislocation, and rhetorical redescription. Chapter seven presents the main empirical analysis by examining the institution of TSLRIC pricing for interconnection access and net costing for the TSO. The analysis considers 'dislocation' by examining attempts by political actors to articulate 'new' discourses around the nodal point of 'cost'. The rhetorical analysis focuses on how actors articulate the metaphorical element of 'cost' in agitating for costing methods and in implementing the TA. The thesis characterises the social landscape by examining the concepts and presuppositions that dominate the TSLRIC and net costing discourse. Political logics examine dislocatory moments in the institution of TSLRIC and net costing by illustrating public contestation over the 'best' model for regulation and accounting for alternatives. Finally, fantasmatic logics explain and critique how subjects were 'gripped' by certain ideological presuppositions of 'costing' attached to the social and political logics of cost. The thesis investigates the formation of political identities characterised by antagonism and uncertainty at numerous levels, including the discursive enunciation of standpoints by actors, and then moves past the enactment of legislation to analyse the contestation over interpreting and implementing the regulation.

- Chapter Two -

Utility Regulation in New Zealand: The Great Competition Law Experiment

Speech from Theresa Gattung, Chief Executive Officer, Telecom NZ
March 20, 2006

Think about pricing. What has every telco in the world done in the past? It's used confusion as a marketing tool. And that's fine, you could argue that's helped all of us keep calling prices up, keep those revenues of high margin businesses going for a lot longer than would have been the case. But at some level whether they are conscious of it or not, customers know that that's what the game has been. They know that were not being straight up.

...

Anyway, back to regulation ... Clearly it is also about, at least in terms of the public discourse, our relationship with our competitors ... But clearly that's not enough. There's still this feeling about disparity and we can say all we like that we're just smarter than the other guys, but how do we demonstrate that in a way that over time will be believed ... Because people want to believe in something, they want to work in an environment that's moving forward.

I CHAPTER TWO OVERVIEW

Chapter two examines dominant economic theories and their insights into the historical story of NZ's regulatory approaches, by interrogating two questions:

- 1) What are the dominant regulatory economic theories? What insights into NZ regulation do these theoretical perspectives provide?
- 2) What is the genealogy of telecommunications regulation in NZ? What is the current regulatory framework?

The chapter examines the theoretical insights and challenges of Chicago and Harvard school economics, capture theory and public interest regulation as they are implicated in NZ's approach to regulating telecommunications. Empirically, the chapter details the shift from the market-based, light-handed regulation to the current sector-specific regulation. The chapter notes the limits of economic theory which include the challenges of a dominant incumbent, the tendency to monopoly and natural monopoly behaviour, the degree of network interdependence, the risk of technological obsolescence, and the social welfare functions of telecommunications (MIT, 2000d, p. 11).

II *ECONOMIC REGULATORY THEORY*

Prominent economic regulatory theories, namely Chicago and Harvard school economics, capture theory, and public interest regulation, are implicated in NZ's regulation of telecommunications (Laffont & Tirole, 2000).

- a) Chicago school economics, popularised by Stigler and Friedman, favours “free-market economics” with little government intervention in markets. It favours ‘laissez-faire’ *regulation*, where markets correct market disparity, focusing on economic efficiency, premised on rationality, and positivism.⁴ For competition law, Chicago school results in more ‘rigorous’ economic regulation (Hovenkamp, 2007).
- b) For competition law, Areeda and Turner argue that Harvard school economics recognises the social impact of markets, acknowledging that markets fail (Sullivan, 1977).⁵ The Harvard approach recognises that social factors conflict with economic analysis, and that it is appropriate to consider the wealth transfer effects between consumers and producers.⁶
- c) Public interest regulation endeavours to ‘protect’ the public from numerous problems, including inefficient markets, exploitation, or from fettered access. As public interest regulation often seeks to enhance consumer welfare at the expense of producer-focused economic theory (Chicago), there is a clear link with Harvard.
- d) Regulatory capture,⁷ popularised by Posner and Stigler, holds that the regulated dominate regulatory agencies, despite the agency supposedly acting in the public interest. Due to vested interests in the outcome of regulatory decisions, the regulated will work to capture the decision makers.

Consequently, this chapter illustrates that each economic theoretical perspective explains aspects of NZ's regulatory approach, but in isolation, each possesses limited explanatory power. Chicago school economics informed the Fourth Labour Government's (1984-1990) economic policies of “Rogernomics”,⁸ incorporating

⁴ See Chapter three and four for the further discussion of positivism.

⁵ By Harvard school economics, the thesis refers to the 1970s reformulation, as opposed to the structuralist Harvard school, 1930-1960.

⁶ For overviews of Chicago and Harvard approaches, see Hovenkamp, 2007; Elhauge, 2007; Elizinga, 1977; Adhar, 2002.

⁷ This is also referred to as “capture theory”.

⁸ “Rogernomics” was coined after the Minister of Finance, Roger Douglas, Member of Parliament [MP].

deregulation, privatisation, and the sale of State-owned assets,⁹ and characterises the approach to competition law from 1986-1999. However, the 1999 election of a Labour-led Coalition Government resulted in a shift to a Harvard-informed competition law policy. However, in instituting the new telecommunications regime, the Government legislated a confusing mix of public interest regulation and regulatory capture.

III ECONOMIC SCHOOLS OF THOUGHT: CHICAGO AND HARVARD

The history of NZ regulation reflects the competition law debate between Chicago and Harvard, concerning consumer welfare and wealth redistribution. Chicago holds that as wealth redistribution is governmental, consumer welfare transactions are an irrelevant regulatory consideration. Harvard accepts that regulatory bodies play a role in consumer welfare, as wealth redistribution is unavoidable in economic decisions (Adhar, 2002).

Competition policy tends to harmonise the goals of efficiency and income distribution. However, in critiquing Chicago, the Williamson model demonstrates net efficient anti-competitive arrangements that result in wealth transferring from consumers to producers (Williamson, 1968). The regulatory focus is what should be done with these wealth redistribution effects. Chicago holds that redistribution is a Government function, and as there is no effect on total surplus the redistribution effect is ignored. Efficiency remains the key goal. Harvard holds consumer welfare should temper efficiency, and that competition law should address the redistribution effect as the transfer of wealth from consumers to producers reduces consumer surplus.

The subsequent section outlines the characteristics of Chicago and Harvard, developing a genealogy of the Chicago and Harvard debate in NZ.

⁹ For accounting studies of this heavy reform period, see Gallhofer, Haslam & Roper, 2001; Lawrence, Davey & Low, 1998; Lawrence *et al*, 1997; Lawrence, 1999; Lawrence & Rahaman, 2001.

A *Chicago: Efficiency*

The competition law objective of Chicago school economics is efficiency, with consumer welfare and wealth redistribution considered irrelevant, as redistribution is public policy issue similar to taxes and social welfare (Adhar, 2002). Advocates argue that regulatory decisions should be limited to economics, as regulatory bodies are appointed and not elected: in a democracy, an elected Government has a mandate to 'govern' the people, and consider wealth redistribution. Thus, as CC members are non-elected, economic experts, the scope of inquiry should be confined to economic considerations: the non-elected CC should leave social policy, wealth redistribution to Government. Finally, if the CC were to make social policy, wealth redistribution decisions, commercial organisations would face an unacceptable degree of uncertainty between competitive and anti-competitive behaviour.

In market situations, Chicago recognises 'total surplus': figure 2.1 illustrates this in a monopoly situation (Mankin, 2001, p. 315).

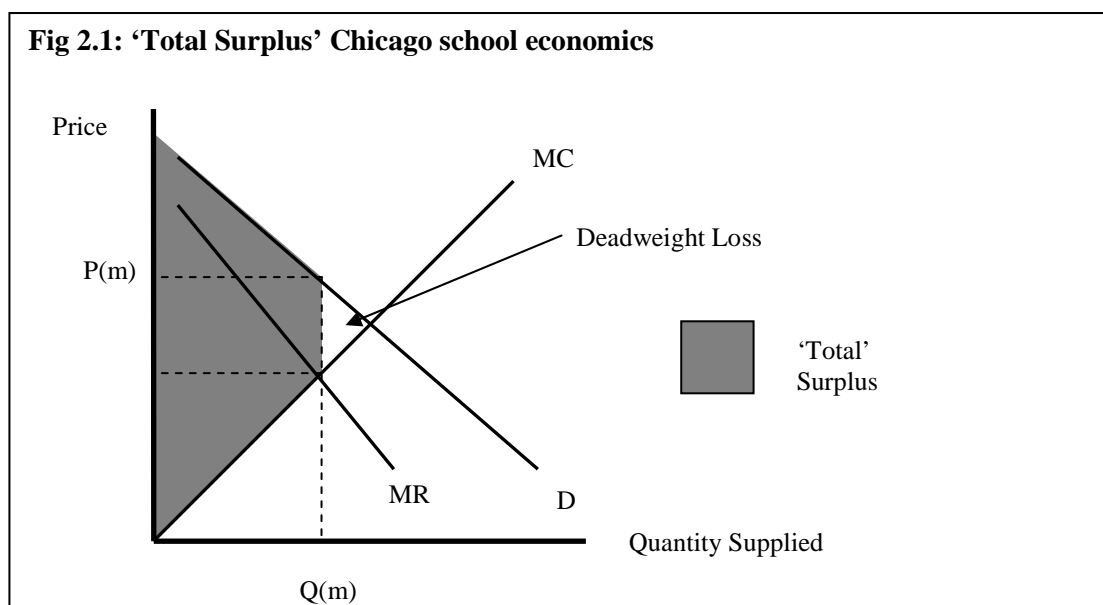


Fig 2.1: Graph of 'Total Surplus' for Chicago school economics (Mankin, 2001)

Through re-conceptualising all producers as 'consumers' (see figure 2.2 below), Chicago argues that 'consumer surplus' equates with 'total surplus'. Consequently, any gain in producer wealth accrues to consumers (Mankin, 2001). These assumptions

render wealth redistribution irrelevant, as ‘market failure’ becomes a social policy issue (Adhar, 2002).

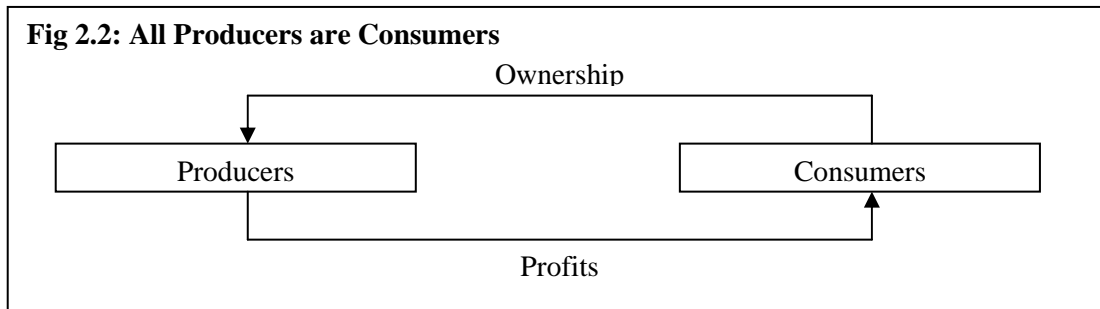


Fig 2.2: Chicago school economics flow of wealth (Mankin, 2001)

For Chicago, if an inequitable portion of wealth accrues to producers it will be redistributed through increased consumption or Government taxation and social welfare policies. Thus, wealth redistribution is a public policy consideration for Government, not competition law and the CC.

B Harvard: Consumer Welfare

Harvard advocates for consumer welfare: figure 2.3 illustrates the Harvard distinction between producer and consumer surplus (Mankin, 2001) such that increases in producer surplus correspondingly reduce consumer surplus. Harvard economists, then, are concerned by the unavoidable transfers of wealth as predicted by the Williamson model where net efficient anti-competitive arrangements transfer wealth from consumers to producers. Harvard challenges the Chicago assumption that all producers are consumers, arguing that firms retain earnings for future investment and not all surpluses can be guaranteed to return to consumers in the long run.

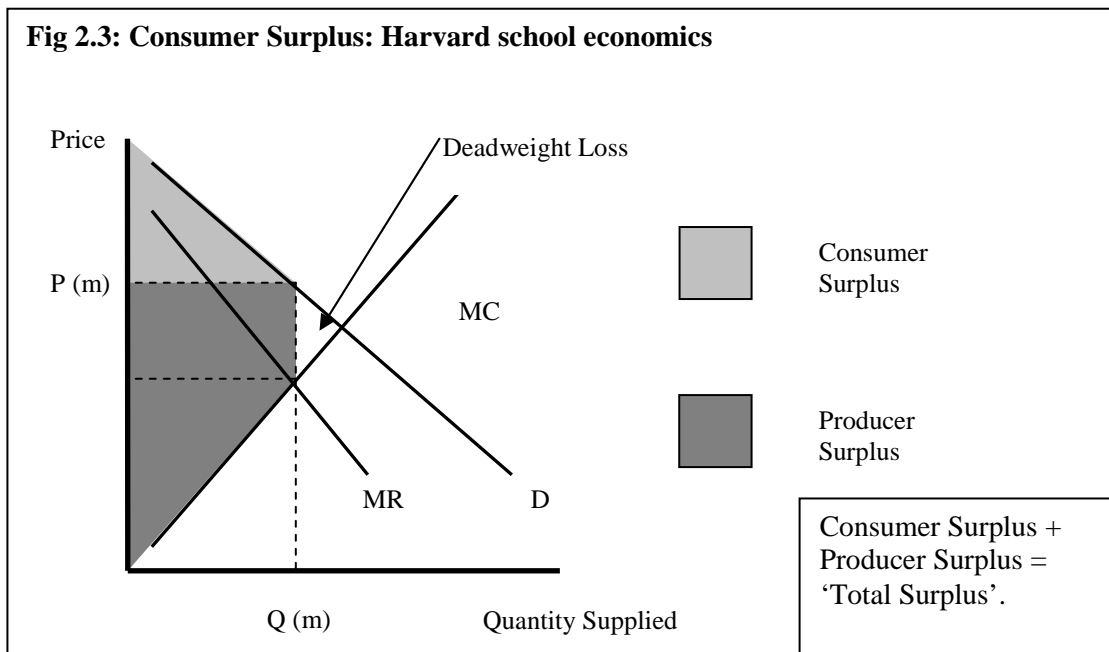


Fig 2.3: Graph of 'Total Surplus' for Harvard school of economics (Mankin, 2001)

Equally, Harvard economists challenge the assumption that CC members are merely economic experts, as 9(4) of the Commerce Act 1986 states that CC members are appointed on the basis of their “knowledge or experience in industry, commerce, economics, law, accounting, public administration, or consumer affairs”. Harvard proponents argue that the CC is an expert panel, authorised to consider consumer welfare and other redistribution issues.

In reflecting the theoretical implications of the Chicago and Harvard approaches to competition law, the next section illustrates the genealogy of these economic approaches to NZ regulation.

C Genealogy of Economics in Competition Law

In thirty years, there have been three shifts in economic approaches to competition law in NZ since the Commerce Act 1975. The following discussion illustrates the effect of these ‘shifts’ in economic theory.

1 1975 – 1986: Consumer Welfare

Section 2A proscribed the purpose of the Commerce Act 1975:

An Act to promote the interests of consumers and the effective and efficient development of industry and commerce through the encouragement of competition
...

In referencing ‘consumers’, the purpose statement could reflect a Harvard approach (Adhar, 2002). However, the combination of ‘consumer’ and ‘efficiency’ implicates both Chicago and Harvard. This is confusing in statutory interpretation terms: a) presentation order can suggest a hierarchal interpretation, in that consumer welfare is ‘more important’ than efficiency, as it is listed first (McDowell & Webb, 1998, p. 299); or b) the Act positively requires the advancement of two mutually agreeable goals: consumer welfare enhances efficiency; efficiency enhances consumer welfare (Burrows, 2002).

2 1986-2001: Chicago Efficiency

The 1984-1990 Labour Government introduced radical economic and social reform (“Rogernomics”), focusing on efficiency and privatisation.¹⁰ This resulted in significant commercial reform, the Commerce Act 1986, and the creation of the CC. The Act contained no explicit purpose statement, although the long title of the Commerce Act 1986 stated, “This is an Act to promote competition in markets in New Zealand”. The judiciary was influenced by the Chicago school in the interpretation of the Act, focusing on efficiency (Kingsbury, 2000):

- a) *Tru Tone v Festival Records Retail Marketing Ltd* [1988] 2 NZLR 353 (CA): Justice Richardson interpreted the Act’s focus as:

... the best allocation of resources occurred in a competitive market where rivalry would ensure maximum efficiency in the use of resources (*Tru Tone*, 1988, p. 358).

This interpretation reinforces the link between efficiency and competition, in a strong Chicago manner.

¹⁰ In part, this was in answer to the protectionist economic policies of the early 1980s, characterised by ‘Think-Big’ infrastructure investment, wage and price freezes, tariffs, and heavy subsidies.

- b) *ARA v Mutual Rental Cars* [1987] 2 NZLR 647 (HC): determined an efficient, localised geographic market for car rental booths at Auckland International Airport under ss 27 and 36 focusing on Chicago product substitution.
- c) *Telecom v Commerce Commission* [1992] 3 NZLR 429 (HC): expanded the market definition by requiring the CC to consider ‘long-term’ dynamic efficiencies in the market, including new technology and new entrants. Efficiency is a core component of Chicago analysis.
- d) *Fisher & Paykel Ltd v Commerce Commission* [1990] 2 NZLR 731 (HC): Fisher & Paykel defended their exclusive dealing clauses with retailers across NZ due to competitors penetrating the market shrinking market share from 95 to 80 per cent, indicating that there was no foreclosure in the NZ whiteware market. Longdin considers the decision to illustrate the Chicago ‘stranglehold’ on NZ’s competition law due to its focus on efficiency and the failure of the Court to consider effects on consumers (Longdin, 1993).

In 1990, the Government clarified that economic efficiency was beneficial to the public, affirming that competition was an end in itself, rather than a means to an end. In relation to mergers and acquisitions, s 3A of the Commerce Act 1986 mandated that the CC consider efficiencies. In further reinforcing the dominance of Chicago economics, the CC argued that wealth transfers between producers and consumers provided no net efficiency gain and should be ignored (CC, 1994, p. 8): e.g. consider Ruapehu Alpine Lifts’ application to purchase Turoa ski-field (CC, 2000). The decision excludes potential benefits from wealth transfers to an economically deprived area, as these public policy concerns were considered inappropriate (CC, 2000). Instead, the decision focuses on efficiency gains including increased ski days, cost savings, and ‘other efficiencies’.

However, the 2001 amendments to the Commerce Act 1986 challenged Chicago’s dominance, as the Labour-led Government policy of “Improving Competition” favoured a consumer welfare approach to competition law.

3 *2001 to Current: Consumer Welfare and Efficiency?*

Under the “Improving Competition” policy, the Commerce Amendment Act 2001 inserted s 1A into the Commerce Act 1986:

The purpose of this Act is to promote competition for the long-term benefit of consumers in New Zealand.

The Minister of Commerce highlighted the shift in focus:

Consumers are given special mention as they are the ultimate beneficiaries of competition. However, the welfare of all New Zealanders will continue to be important ... The focus on competition in the purpose statement also does not preclude wider public benefit issues being taken into account where appropriate. It simply clarifies that there should be a presumption in favour of competition ... (Paul Swain, MP, 2001, p. 23).

David Cunliffe, MP, chairperson of the Commerce select committee, reported that the new purpose statement made it “clear that the New Zealand Parliament supports a welfare-based Harvard School approach that puts the interests of consumers first” (NZ Hansard, 2001). Section 1A constitutes significant policy change in that competition is no longer an end in itself: competition is a means to an end, and the end is the long-term benefit of consumers. The new purpose represents a shift to a Harvard-informed model of competition regulation (by incorporating ‘consumers’), with an aspect of the Chicago school (by implicating ‘long-term’). However, the CC openly expressed its reluctance to shift to the consumer welfare test mandated by s 1A of the Commerce Act 1986 (CC, 2005): e.g. the *Air New Zealand* and *Qantas* merger decision had major implications for consumers, as noted by the CC (2006, para 60). However, efficiency was still the overarching economic measure applied, particularly in relation to cost savings and market structure. This illustrates that the CC is politically active in ignoring directions to shift economic focus to the Harvard approach and openly expressing discontent (CC, 2005).

The incorporation of “long-term benefit” into s 1A somewhat clouds the interpretation of the purpose statement. The phrase re-introduces Chicago economic

efficiency as a regulatory driver. Potentially, the consumer could be worse off in the short term. The CC favours long-term dynamic efficiency, due to the emphasis on long-term benefits to consumers (CC, 2001, p. 22). Dynamic efficiency is complex, incorporating shorter-term elements of allocative or productive efficiency. Due to the ‘long-term’ nature of dynamic efficiency, certain transactions and market arrangements will result in short-term allocative or productive inefficiencies, but could result in greater long-term dynamic efficiency: consumers may suffer short-term harm for longer-term benefits.

Generally, there have been shifts between Chicago and Harvard informed approaches to NZ’s competition law, illustrating the political nature of the underlying rationale for regulatory intervention. These debates are relevant to the regulation of telecommunications. In particular, the heyday of Chicago economics resulted in the “light-handed” regulatory experiment.

IV THE GREAT COMPETITION LAW EXPERIMENT: LIGHT-HANDED REGULATION AND TELECOMMUNICATIONS

Chicago economics dominated NZ’s competition law, focusing on minimal ‘market’ interference, while assuming that the market would correct any irregularity, such as dominance or the lack of competition.¹¹ Successive Governments held that the market-driven, light-handed regulation provided the most effective means of “achieving consumer benefits and efficient economic outcomes” (Ministry of Economic Development [MED], 2001, p. 4). ‘Light-handed’ referred to the Government approaching competition regulation in a limited ‘hands-off’ manner, emphasising commercial negotiation, generic competition law rules, and promoting the Courts as a forum for dispute resolution. This is known as the ‘great competition law experiment’

¹¹ The implications of telecommunications and Chicago economics are considered in more detail later in the chapter.

for two reasons: a) NZ was one of the first countries to deregulate and privatise telecommunications; and b) NZ was the only country to adopt light-handed regulation for all competition law, including networked industries (Laffont & Tirole, 2000, p. 34). The experiment proved unsuccessful.

NZ's telecommunications industry was deregulated and privatised in the late-1980s. On 1 April 1987, the Government formed Telecom Corporation of NZ, a State-owned enterprise.¹² The reforms intended to "improve the telecommunication industry's economic performance and increase consumer benefits by creating competitive, open-entry telecommunications markets supported by general competition law" (MED, 2001, p. 3). In facilitating 'competitive entry into telecommunications' the market was fully deregulated on 1 April 1989. In September 1990, Telecom was privatised to a consortium fronted by Ameritech of Chicago and Bell Atlantic of Philadelphia for NZ \$4.25 billion. Conditions of sale required that a portion of shares be offered to the NZ public, Telecom operate a 'business separation' model, and Telecom comply with information disclosure provisions, including:

- a) Price information about prescribed services;
- b) The full text of interconnection agreements within a specified time after their conclusion; and
- c) The financial statements of Telecom NZ Ltd (MED, 2001, p. 3).

The sale included the national network (PSTN) and residential and business retail businesses. Telecom's control of the PSTN constituted an effective monopoly.¹³

¹² This separated telecommunications from the NZ Post Office, an incredibly inefficient State Department with over 18,000 employees. For example, it could take six months to get a new telephone.

¹³ The following table demonstrates the extent of dominance in the provision of PSTN Main Lines (fixed-wire local-loop) in 1999 (MIT, 2000d, p. 60):

Operator	Number of Lines	Percentage of Total
Telecom	1,800,000	98.3%
CLEAR	10,000	0.5%
TelstraSaturn	22,500	1.2%

Please note that TelstraSaturn and CLEAR subsequently merged to form TelstraClear in 2001.

In recognising Telecom's 'dominance', the KSO obligations incorporated into Telecom's Constitution required that Telecom:

- a) Maintain a local free-calling option for all residential telephone customers.
- b) Ensure that the rate of increase in the residential telephone line rental does not increase in real terms above its 1 November 1989 rate of \$27.80 per month, unless Telecom's profits are unreasonably impaired.
- c) Ensure that the line rental for residential users in rural areas is no higher than the standard urban residential line rental.
- d) Continue to make ordinary residential telephone services as widely available as at the date of adoption of the KSO.

Consequently, the following sections demonstrate the light-handed approach, before moving to illustrate practical limitations.

A The Light-Handed Experiment

The light-handed regime was modified for NZ's networked industries (including telecommunications, gas, and electricity), operating in a four-fold manner (Gilbertson, 2001, p. 5; Patterson, 1998, p. 139).

1 Information Disclosure and Business Separation

At privatisation, Telecom was obliged to provide key accounting information to the Government, including profit margins and the cost of satisfying the KSO (MED, 2001, p. 11). Telecom was required to separately conduct business units including local calls, long-distance tolls, and mobile services.

2 The Commerce Act 1986

Section 36 of the Commerce Act 1986 intended to capture anti-competitive behaviour by large market players. To establish a breach of s 36, it was necessary to determine that Telecom:

- a) was 'dominant' in a market;

- b) had ‘used’ its dominant position; and
- c) had acted for an anti-competitive ‘purpose’.¹⁴

Litigation had to establish all three elements, with the Courts concentrating on ‘use’. In *Telecom Corporation of New Zealand Ltd v CLEAR Communications Ltd* [1995] 1 NZLR 385 (PC), the Privy Council applied the ‘competitive conduct test’ (p. 403).¹⁵

3 *Private Attorney-Generals: Telecom’s Competitors*

The CC had limited dispute resolution capacity (due to insufficient funding) and consequently, Telecom’s competitors resorted to litigation to ‘enforce’ the Commerce Act 1986 (MIT, 2000d, 13; Patterson, 1998, p. 139). Although the CC did instigate several proceedings against Telecom in the early 1990s this was rare, as the CC would instigate proceedings to establish important principles under the Commerce Act 1986, where there were serious breaches and where there was a reasonable chance of success (Borrowdale, 2000, p. 656). The cost and complexity of litigation challenged the ability for the CC and the Courts to enforce the Commerce Act 1986. Consequently, the CC encouraged Telecom’s competitors to take action, as the CC could not ‘afford’ litigation against Telecom (Patterson, 1998, p. 139).

4 *Threat of Government Intervention*

If the telecommunications industry failed to ‘effectively’ develop competition, the Government threatened to further regulate the industry. Further regulatory options included enforced business separation, increased information disclosure, sector-specific regulation, or heavy-handed regulation with direct Government involvement in the day-to-day management, pricing, access, and dispute resolution of telecommunications.¹⁶

¹⁴ The Commerce Amendment Act 2001 amended s 36 in line with Australia: ‘substantial degree of market power’ replaced ‘dominant’ and ‘taking advantage of’ replaced ‘used’.

¹⁵ *Telecom v Clear* is considered in more detail later in the chapter.

¹⁶ More rigorous examination of regulatory approaches follows later in the chapter.

These four elements characterised the light-handed framework for telecommunications from 1986 to 2001. It was a unique system, as NZ was the first to implement such an approach and no other country followed NZ's lead: it is the 'great competition law experiment'. The next section illustrates the practical application of the light-handed framework through examining the interconnection dispute between Telecom and Clear.

B Light-handed Regulation – Telecom v Clear

Networking telecommunications in NZ is complex due to its high-density urbanisation, sparsely populated rural areas, and difficult geographical terrain. As the light-handed system provided no interconnection access regime, Telecom possessed a competitive advantage by holding the PSTN (Gilbertson, 2001, p. 2). Telecommunications relies on network interdependence, as industry players need access to each other's networks to deliver services: all industry players required access to Telecom's network (MIT, 2000d, p. 60). Under the light-handed system, industry players negotiated interconnection agreements with Telecom: Telecom's dominant negotiating position resulted in litigation. The interconnection dispute between Telecom and Clear proved to be the primary issue shaping telecommunications competition during the 1990s. The debate came to a head in early 1994, resulting in the Privy Council case of *Telecom v Clear*.

1 The Dispute

Clear won a contract to provide the Ministry of Justice with telecommunications services, requiring access to the PSTN, with Clear entering negotiations for an interconnection agreement in 1990. The principal contractual issue was the appropriate methodology for interconnection pricing: Telecom wished to charge Clear its standard business per minute rate for any call to Telecom's network, arguing that Clear was a

normal business customer. Telecom rejected any notion of reciprocity, paying for calls originating on its network and terminating on Clear's network (Carter & Wright, 1999, p. 2). Clear proposed 'bill and keep' pricing (a two-way interconnection pricing scheme where each network agrees to terminate calls originating from another network at no charge).¹⁷ Telecom objected on the basis of the difference in network size and the imbalance in the direction of calls. Both parties subsequently modified their positions: Clear sought interconnection pricing at incremental cost, recognising the call imbalance; Telecom argued for interconnection prices based on the "Baumol-Willig" rule (Laffont & Tirole, 2000, p. 34).¹⁸ The "Baumol-Willig" rule requires that a "new entrant pay the dominant incumbent the opportunity cost of providing interconnection together with a contribution to common costs and profits, including any monopoly profit foregone by the dominant incumbent from any business lost to the new entrant" (Laffont & Tirole, 2000, p. 23). As both parties objected, commercial negotiations stalled.

In August 1991, Clear took Telecom to court alleging a s 36 breach, arguing that the "Baumol-Willig" rule constituted "use" of a "dominant position" for the purposes of restricting or preventing competition in the telecommunications market. It was complex, costly litigation, with numerous appeals and cross appeals: the High Court found that the "Baumol-Willig" rule did not contravene s 36; the Court of Appeal disagreed, holding that Telecom 'abused' its dominant position. Telecom appealed to the Privy Council.¹⁹

¹⁷ 'Bill and keep' pricing is traditionally applied in situations where competing networks are of a similar size (Laffont & Tirole, 2000, p. 30). See Chapter three for more discussion.

¹⁸ The "Efficient Component Pricing Rule" was developed by William Baumol and Robert Willig.

¹⁹ The London-based Privy Council was the highest judicial appellate court for NZ, but it has subsequently been replaced with the establishment of the NZ Supreme Court.

2 *Privy Council Appeal*

The Privy Council found no s 36 breach, holding that the “Baumol-Willig” rule was a valid interconnection pricing method, and determining that the appropriate ‘use’ test was the ‘competitive conduct test’:

a person cannot be said to use a dominant position if he or she acts in a way which a person not in a dominant position but otherwise in the same circumstances would have acted (*Telecom v CLEAR*, 1995, p. 403).

In applying the ‘competitive conduct test’, their Lordships concluded:

Telecom in charging Clear its opportunity cost for local interconnection was not using its dominant position since that is what it would have charged in a fully competitive market (*Telecom v CLEAR*, 1995, p. 405).

Thus, Telecom was entitled to use “Baumol-Willig” for interconnection pricing.

3 *Effect of the Decision*

The decision stunted the development of competition, allowing Telecom to control network access. As access to the incumbent’s network is crucial in developing ‘effective’ competition, the decision to allow Telecom to charge ‘Baumol-Willig’ strengthened its dominant position:

- a) Telecom could charge a higher interconnection price than would be possible in a competitive market. The fallacy in the Privy Council’s application of the competitive conduct test is that to be able to charge monopoly rents, the company would have to be in a monopoly or near-monopoly market, which is not possible in a competitive market.²⁰
- b) Telecom enjoyed supra-normal interconnection profits. This investment recoupment presented a significant barrier to entry in development competition, and affected public perception of the industry, the CC, and the Government, as promised reforms failed to materialise (Patterson, 1998, p. 139).
- c) Saturn and Clear invested in the development of localised networks. Saturn invested in Petone and the Kapiti Coast, while Clear invested in core business districts in Auckland, Wellington, and Christchurch. This was a positive result, as network competition is the most stable form of competition (Laffont & Tirole, 2000, p. 13).

²⁰ Although Telecom did not use the “Baumol-Willig” rule in subsequent interconnection agreements, it had a ‘cooling’ effect, as it retained the ability to use this rule (MIT, 2000d, p. 9).

- d) Telecom was the pseudo-telecommunications regulator, controlling market access (Gilbertson, 2001, p. 4).

Therefore, Telecom's encumbrance of industry competition represented a manifest failure of light-handed regulation. The subsequent section illustrates the theoretical and practical limitations of the light-handed framework.

V THE FAILURE OF LIGHT-HANDED REGULATION

The New Zealand experience is a fascinating, perhaps extreme one. It demonstrates the difficulty of competition in the absence of regulation (Laffont & Tirole, 2000, p. 34).

A What is it About Telecommunications?

Telecommunications provides a challenging regulatory environment for four reasons:

- 1) The networked component encourages the development of natural monopolies.
- 2) Network interdependence, as industry players require network access to deliver services.
- 3) The challenge of *constant* technological change, investment, and innovation. Technical obsolescence constitutes a very real threat, as today's telecommunications services will be radically different in the foreseeable future.
- 4) Society is reliant on telecommunications, and as a public good, 'private' telecommunications become 'pseudo-public' with an increasing social welfare role (Horwitz, 1989, p. 131). The incorporation of the KSO into Telecom's constitution recognises this. Society's access and the extent to which one is able to enjoy the advantages of telecommunications depends on the ability to gain 'competitive' access to the network, and thus, the effectiveness of regulation (MIT, 2000d, p. 11).

The MIT noted that the primary failures of the light-handed regime included the:

- 1) inability to supervise the strong interdependence of the networked industry and rapid technological changes;
- 2) significant barriers to entry preventing the establishment of efficient and desirable competition between network operators;
- 3) failure to discourage Telecom's economic incentives to prevent, delay, or add costs to the entry of competitors; and

- 4) significant cost and time delays of the dispute resolution process, as well as the incomplete remedies, particularly in relation to interconnection access (MIT, 2000d, pp. 7-11, 51).

In short, the light-handed regime was inappropriate for regulating telecommunications, due to Telecom's dominant position, the necessity for network access, and the lack of an interconnection access regime. Consequently, the following sections examine the theoretical constraints of regulating networked industries and the specific failures of light-handed regulation.

1 Telecommunications: Networked Natural Monopolies

McConnell explains the characteristics of a natural monopoly:

In a few industries economies of scale are particularly pronounced, and at the same time competition is impractical, inconvenient or simply unworkable. Such industries are called *natural monopolies*, and most of the so called public utilities – the electric and gas companies, bus and railway firms, and water and communications facilities – can be so classified ... (McConnell, 1960, p. 373).

They arise where the largest or first supplier possesses an overwhelming cost advantage over other competitors,²¹ particularly in industries where capital costs predominate, creating economies of scale and high barriers to entry. Telecommunications networks possess high capital costs: the “network characteristics of telecommunications” pertain to monopolistic-type market structures (Gilbertson, 2001, p. 1). In networked industries, although industry players compete in the end-user services market, these players are interdependent in the provision of complementary network services (Gilbertson, 2001, p. 1).

Figure 2.4 illustrates the microeconomic characteristics of a natural monopoly: first, high sunk costs; second, low constant marginal costs [MC]. A ‘natural monopoly’ describes a firm’s cost structure, while a ‘monopoly’ depicts market structure (see figure 2.5 below).

²¹ Economists disagree as to the existence of natural monopolies. Free-market oriented economists tend to argue that natural monopolies only exist in theory and not in practice.

Fig 2.4: Graph of a Natural Monopoly

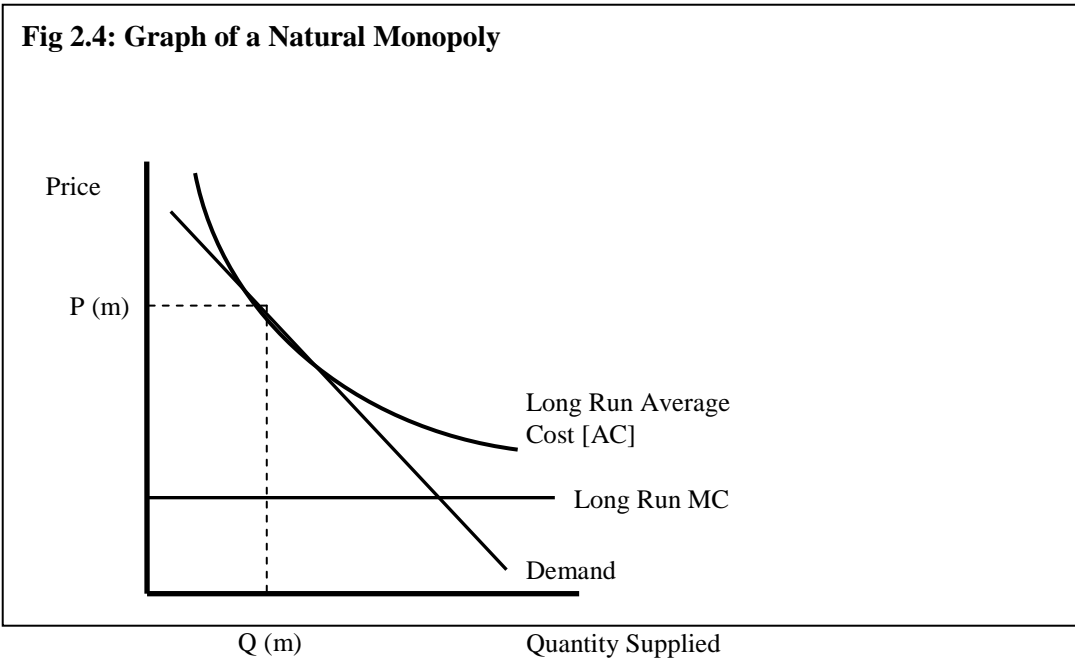


Fig 2.4: Graph of a Natural Monopoly

In contrast, Figure 2.5 illustrates the normal MC characteristics of a monopoly, where MC decreases with increased economies of scale, but past the optimal point of supply, MC increases due to the increase in inefficiency and the reduction in economies of scale.

Fig 2.5: Graph of a Monopoly

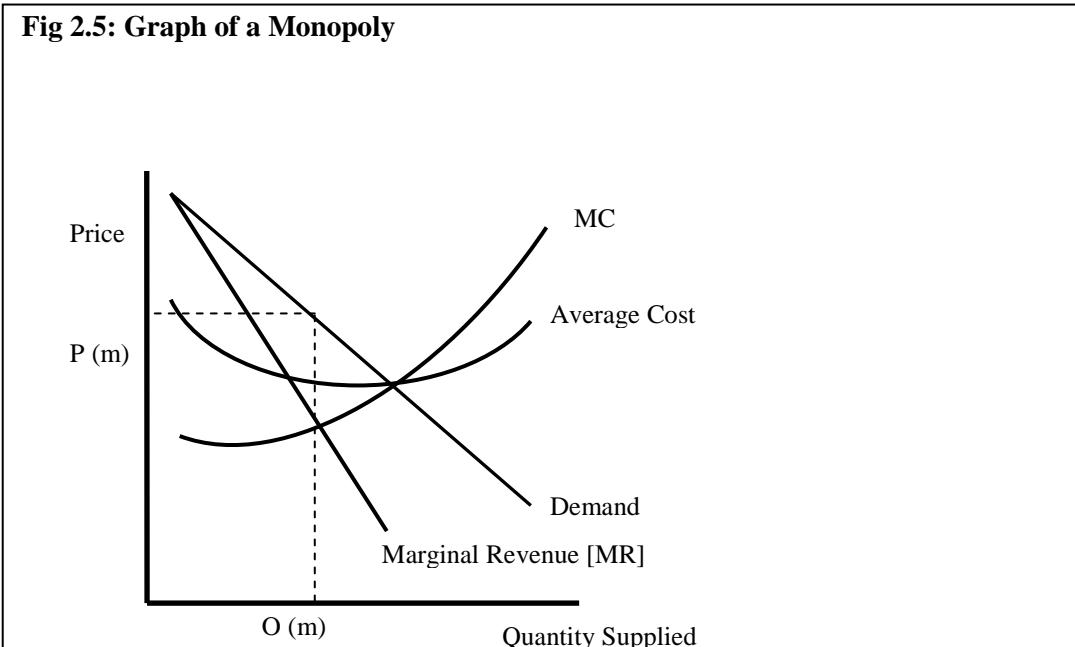


Fig 2.5: Graph of a Monopoly

The difference between natural monopolies and monopolies manifests itself in the presentation of MC as illustrated in Fig 2.4 (low, constant LRMC) and Fig 2.5 (curvilinear MC). In economics, the natural monopoly ‘cost’ advantage is difficult to

replicate: by definition, a natural monopoly is the most efficient market form. Consequently, natural monopolies present a difficult regulatory challenge. Friedman, in relation to natural monopolies, said “there is only a choice among three evils: private unregulated monopoly, private monopoly regulated by the state, and government operation”, arguing that “the least of these evils is private unregulated monopoly where this is tolerable” (1962, p. 28).²²

The existence of a monopoly is not anti-competitive, as the regulatory concern is where monopolists “use” or “take advantage of” of their position to disadvantage potential or new entrants (see s 36 of the Commerce Act 1986). Such behaviour is anti-developmental and anti-competitive. Due to the nature of natural monopolies, they not only have the natural advantage of the dominant market position, but habitually the opportunity arises to use this market position. Telecom holds the national PSTN; entrants require interconnection; Telecom’s bargaining position and power cannot be understated. In negotiating interconnection, Telecom holds the economic incentive to excise monopoly rents.²³ Equally, there are powerful incentives to control the market share:

[E]ven ‘small’ acts by the incumbent, such as complicating transfer processes and requiring customers of competitors to dial an access code or receive two bills instead of one, quickly escalate into a substantial problem for competition (Gilbertson, 2001, p. 3).

This results in entrants facing higher access prices, higher operation costs, and product restrictions.

New entrants earn income by suppling end-user services delivered by Telecom’s PSTN; Telecom aimed to maximise interconnection prices and impose unfavourable

²² Friedman argued: “over time I have gradually come to the conclusion that antitrust laws do far more harm than good and that we would be better off if we didn’t have them at all, if we could get rid of them” (1999, p. 7).

²³ See the Privy Council’s acceptance of the Baumol-Willig rule in *Telecom v Clear*.

terms and conditions (Gilbertson, 2001, 4). To maximise monopolistic rents, Telecom could:

- 1) Reach agreements to supply end-user services in its own timeframe, as delay is often to its advantage. Delay tactics include litigation to test the limits of agreements. Although unsubstantiated, delay could justify the Telecom and Clear litigation (Gilbertson, 2001, p. 5);
- 2) Impede competition (and innovation) by introducing terms and conditions and pricing methodologies that favour the incumbent, such as the “Baumol-Willig” rule;
- 3) Impose unfavourable conditions and higher access prices to limit competitors to small market shares in an environment of increasing returns to scale or to restrict competitors from exploiting the incumbent in an environment of economies of scope;
- 4) Impose interconnection standards limiting network functionality, or which lead to higher costs for competing network operators; and finally,
- 5) Limit competition by impeding number portability, as the incumbent controls telephone numbering. NZ examples include the 0867 access code introduced by Telecom to channel Internet traffic from ISP, and toll free numbering (with a dispute between Telecom’s 0800 and Clear’s 0508).²⁴

The light-handed regime failed to regulate these economic incentives. First, Telecom and new entrants had to commercially negotiate, placing Telecom at a comparative advantage due to the network. Second, under the Commerce Act 1986, the onus of proof was on the complainant: complainants instigated litigation against Telecom, demonstrated the alleged breach of the Act, countered Telecom’s defence, and invited the court, on the balance of probabilities, to determine whether the Act was breached. Finally, Gilbertson argues that Telecom had to exploit the regulatory regime to restrict competitors:

In fact, the directors of [Telecom] have a fiduciary duty to seek to extract the highest rents available to it as a result of its business position, as does any other profit-maximising firm (Gilbertson, 2001, p. 3).

²⁴ This problem has been improved through introducing the Number Administration Deed [NAD] in December 1998, removing Telecom from solely administering numbering in NZ.

In summary, Patterson argues that the tendency for the development of natural monopolies within telecommunications explains the failure of light-handed regulation:²⁵

The fundamental flaw of the light-handed model adopted in New Zealand is that it relies on the incumbent monopolist to act in a fair and reasonable way. As a matter of public policy, a regime to control the activities of industries with natural monopoly characteristics which has, as its central tenet, an assumption that the monopolist will act fairly and reasonably and not use its monopoly position to benefit itself at the expense of its competitors, is at best naïve. It is because economic theory predicts that a monopolist will act in its own self interest in confronting emerging competition, and is likely in that process to misuse its own monopoly power, that a policy to prevent that possibility is needed at all (Patterson, 1998, p. 148).

The preceding sections examined the general theoretical constraints of regulating telecommunications, demonstrating the extent of economic incentives to hinder the development of competition. The following section illustrates the specific reasons for the failure of light-handed regulation, including the lack of CC resources, the lack of a credible threat of Government intervention, and the failure to capture anti-developmental behaviour.

2 *Problems with Light-handed Regulation*

(a) Limited Commerce Commission Resources

Financial constraints limited the CC's capacity to exercise jurisdiction over the Commerce Act 1986. Despite the political rhetoric of support, Governments failed to provide sufficient funding for investigation and litigation. Due to technological changes and network interdependence, it is necessary to have comprehensive information to regulate telecommunications (Laffont & Tirole, 2000, p. 15). However, the CC had limited scope for investigations. The 1991-1992 CC investigation of telecommunications resulted in the publication of a critical report describing Telecom as a 'de facto regulator'. In court, Telecom challenged the CC's right to investigate, claiming that the investigation was *ultra vires*. Telecom succeeded: The Court of

²⁵ The United Kingdom [UK] Office of Telecommunications [OFTEL] reinforces this: "Some rules beyond general competition law are necessary to prevent the residual powers and advantages of incumbents being exploited in a way which frustrates the development of competition or unfairly exploits the consumer" (OFTEL, 1998, paras 4.24 and 4.34-4.35).

Appeal in *Commerce Commission v Telecom Corporation of New Zealand Ltd* [1994] 2 NZLR 421 (CA) severely circumscribed the CC's investigatory role. President Cooke²⁶ noted that the Commerce Act 1986 conferred no express or implied power on the CC to conduct such investigations:

Wide though the powers and functions are, they do not extend to conducting an inquiry and publishing a report on the efficacy or otherwise of the Disclosure Regulations ... Nor do the functions and powers extend to making findings adverse to persons or corporations (in this instance Telecom) otherwise than when determining an application before the Commission. That being so, it follows that a report publishing such findings cannot be permissible (*Commerce Commission v Telecom*, 1994, pp. 428-429).

Despite conferring broad powers on the CC to enforce the Commerce Act 1986, the CC had limited capacity to take judicial proceedings. Not only was litigation expensive, but a lack of investigative material made judicial proceedings unlikely due to the CC's requirement for *guaranteed* wins (Borrowdale, 2000, p. 656). Furthermore, Gilbertson illustrates the litigation problem in telecommunications:

Experience has demonstrated that such litigation is slow, costly, susceptible to manipulation and delay by the incumbent, often fails to produce definite outcomes, and only results in remedies after the conclusion of the proceedings, which can be too late to prevent substantial harm to the developing process of competition (Gilbertson, 2001, p. 5).

Allegedly, litigation became a tactic for Telecom, as they had superior financial resources (Gilbertson, 2001, p. 5). Thus, the lack of funding in respect of investigations and litigation affected the efficacy of the light-handed regime.

(b) The Lack of a Credible Threat of Government Intervention

Although acknowledging that a threat of Government re-regulation may have existed, Ergas doubts whether this threat held any credibility. To be credible, the threat needed 'substance':

Governments may have had a gun pointed at the incumbent's head; unfortunately, they stood between it and the target ... In practice, the threat of re-regulation could not have seemed especially credible. Having staked substantial political capital on the virtues of the [light-handed] regime, governments were hardly likely to walk away from it ... The hand which was meant to be light had all but vanished (Ergas, 1995).

²⁶ Later, Lord Cooke of Thorndon in the House of Lords (UK).

Given the ‘political capital’ in the system, the threat of Government intervention did not seem especially credible.

(c) Failure to Regulate for Anti-developmental Behaviour

The light-handed regime was unable to counter the Telecom’s incentives to act in an anti-competitive or anti-developmental manner. Gilbertson argues that the framework, particularly s 36, failed to deal with the developing nature of telecommunications: e.g. the Privy Council’s “competitive conduct test” enabled Telecom to engage in conduct with an anti-developmental effect in a developing market:

Examples of conduct [in NZ] that passes the ‘use’ test, but which is prohibited by foreign regulators because of its anti-competitive effect in developing telecommunications markets, include: highly targeted price discounting; use of the Baumol-Willig Rule in interconnection pricing; refusal to provide local call resale; and refusing all rebilling (Gilbertson, 2001, p. 3).

NZ’s approach to telecommunications regulation contrasted with most OECD countries: only four countries (Turkey, Poland, Japan, and NZ) had no independent telecommunications regulator (MIT, 2000d, p. 16). The ‘standard’ approach to telecommunications regulation is characterised by asymmetric, sector-specific regulation (Laffont & Tirole, 2000, p. 13). The international best practice model consisted of an independent telecommunications regulator governing access, pricing, and associated technical regulation, and general competition law. Some countries also had a regulator for telecommunications mergers or take-overs (MIT, 2000d, p. 17).

The deregulation and privatisation of State telecommunications is complex, requiring regulation of the ‘anti-competitive’ and ‘anti-developmental’ economic incentives that result from these structural changes (Laffont & Tirole, 2000, p. 13). The MIT acknowledged the failure of the light-handed regime:

- there is considerable scope for Telecom and, in some cases, other network operators, to:
 - refrain from passing cost reductions on to consumers

- charge inefficient non-cost based access prices
- inhibit or delay competition, without necessarily breaching the Commerce Act.

... The existing [light-handed] regulatory regime is not best suited to achieving the Government's objective for electronic communications (MIT, 2000d, p. 25).

In summary, within the light-handed regime, there were too many incentives for Telecom to act anti-competitively or anti-developmentally. Politically, the failure of the light-handed system was disconcerting, and telecommunications was entrenched as a major election issue for the 1999 General Election. The following section depicts the increasing politicisation of telecommunications, before moving to consider the 're-regulation' of telecommunications subsequent to the election.

VI *POLITICISING TELECOMMUNICATIONS*

Telecommunications is political, as the industry operates in the public-private dichotomy where 'private' telecommunications possess social welfare, public good qualities (Horwitz, 1989, p. 131). Throughout the 1990s, Telecom was publicly and politically criticised for profit hoarding, poor service, high prices, and slow technology 'rollout'. Telecommunications increasingly became a political issue and the Government's agents tried to intervene: the CC failed to publish the 1992 report on telecommunications. However, the Ministry of Commerce (now the MED) published several discussion papers and investigations into the telecommunications industry:

- a) In January 1998, a discussion paper proposed increased penalties for anti-competitive behaviour to decrease Telecom's incentives to act anti-competitively. The maximum corporate penalty under the Commerce Act 1986 was originally \$300,000. As Telecom's annual profit was significantly above \$500,000,000, the maximum penalty did little to deter Telecom from contravening the Act. Equally, due to the contestable nature of litigation, demonstrating a breach of the Act was complex. Consequently, the Commerce Amendment Act 2001 increased the maximum penalty for contravening the Commerce Act 1986 to the greater of \$10,000,000, three times the value of any commercial gain resulting from the contravention of the Act, or ten per cent of the turnover of the body corporate and its interconnected body corporates (see s 80).
- b) In June 1998, the Treasury and Ministry of Commerce released a "Strategic Overview Paper", highlighting key industry reviews including

number administration and portability issues; penalties and remedies under the Commerce Act; and the Telecommunication (Disclosure) Regulations.

- c) In November 1998, the Ministry of Commerce published a Telecommunications (Disclosure) Regulations discussion paper. The paper recommended that Telecom produce separate financial statements concerning the local-loop and its other telecommunications businesses and provide a “full economic costing” of the KSO, disclosing the methodology employed to determine the cost.
- d) The Government enacted the Telecommunications (Disclosure) Regulations 1999 detailing significant changes to Telecom’s disclosure regime including requiring Telecom to calculate and disclose the net economic cost of complying with the KSO obligations.²⁷

The increasing political and public discord surrounding Telecom and telecommunications, illustrates that the Government and its agents increasingly turned to accounting information as a mechanism for gathering information about and controlling Telecom.²⁸ The failure of the light-handed regime resulted in the 1999 general election presenting an opportunity to re-regulate telecommunications. During the election campaign, all major political parties argued for industry reform, e.g. Labour campaigned for ‘responsible re-regulation’ where necessary, promoting a full Ministerial Inquiry and the implementation of regulatory changes in the pursuit of consumer benefits and efficiency. Its coalition partner, the Alliance Party, campaigned for full industry regulation. Although not key party manifesto, these policies played ‘expertly’ on the public perception of the telecommunications industry (Patterson, 1998, p. 138).

²⁷ See Appendix 1 for the KSO net costing requirements as prescribed in the Telecommunications (Disclosure) Regulations 1999.

²⁸ This forms the focus of this thesis, in terms of the interface of law and accounting and the increasing need for accounting information.

A *The Labour-Alliance Coalition Government - 1999*

1 *The Fletcher Report – the Ministerial Inquiry*

Labour and the Alliance won the 1999 election. The Coalition Government organised a MIT, with broad terms of reference, to recommend regulatory change. After a detailed study, the MIT recommended *ex ante* regulation, which included:

- a) Telecommunications-specific regulation, with the establishment of the Electronic Communications Commissioner;
- b) Designated interconnection with Telecom’s network with TSLRIC pricing and wholesaling of Telecom’s retail services;
- c) Specified interconnection between all carriers;
- d) An access regime, with access objectives to assess the desirability of specification or designation of a service to promote the long term interests of existing and potential end-users, by:
 - i) Facilitating efficient competition;
 - ii) Promoting efficient any-to-any connectivity;
 - iii) Encouraging efficient use of and efficient investment in infrastructure; and
- e) Maintenance of the existing KSO regime (MIT, 2000d, pp. 7-11, 51).

The MIT released its report in September 2000.

2 *The Government’s Response*

In December 2000, the Government detailed a new regulatory regime to ensure the “delivery of cost efficient, timely, and innovative telecommunications services on an ongoing, fair, and equitable basis to all existing and potential users” (MED, 2001, p. 15). The key features included:

- a) Establishment of the Telecommunications Commissioner in the CC.
- b) Designation (to enable pricing and access obligations to be set) of:
 - i) Interconnection with Telecom’s fixed telephone network with TSLRIC pricing;
 - ii) Wholesaling of Telecom’s fixed services; and

- iii) Number portability.
- c) Deferred specification of fixed to mobile carrier pre-selection on Telecom's network;
- d) Provision for Commissioner to recommend the regulation of other services to the Minister of Communications; and
- e) An upgrade of the KSO requirements and the development of a net costing model for the KSO, allowing Telecom to recoup a proportional element of the cost of meeting the KSO from 'liable' industry participants who interconnect with Telecom's network (MED, 2001, p. 17).

In May 2001, the Government introduced the Telecommunications Bill to Parliament. After Royal Assent, the Minister for Communications, Paul Swain MP, declared that: "[t]he government has passed landmark telecommunications legislation aimed at reforming the telecommunications industry in New Zealand to deliver a better deal for consumers" (Swain, 2001d).

VII CORRECTING EXPERIMENTS: TELECOMMUNICATIONS ACT 2001

A 'Re-regulating' Telecommunications

The Labour Government campaigned for 'responsible re-regulation', and the recent regulatory history consists of a systematic re-regulation of the commercial sector. This State re-regulation 'reverses' Government policy from 1984-1998. Government rhetoric indicates that light-handed regulation was unsuccessful due to a stagnation and poor competitive growth in key infrastructure industries such as telecommunications and electricity. In response, the 1999 Government increased its participation in the commercial sector, reconstituting the regulatory framework. Government rhetoric reinforced the 'public interest' in and 'public benefit' of re-regulation, recognising the increased politicisation of competition law.

1 The Move to Sector-Specific Regulation

In implementing sector-specific regulation, the TA signals a significant shift from light-handed regulation in moving NZ closer to the international best practice regulatory model (including the UK, the United States of America [USA], the European Union [EU], Canada, and Australia) (MIT, 2000d, p. 17). Professor Kahn, in advocating for sector-specific regulation, stated:

It cannot be overemphasised that immediate blanket deregulation is not a panacea. Well designed regulations and anti-trust safeguards are likely to result, ultimately, in more competitive markets with more innovation than immediate deregulation could provide. Moreover, until competition develops, it is important to maintain safeguards to protect consumers and to prevent incumbent monopolists from stifling the growth of competition (Kahn, 1996).

With telecommunications and electricity,²⁹ successive NZ Governments have placed key industries within sector-specific regulatory environments, radically altering competition law and calling the ‘light-handed’ approach and the Commerce Act 1986 into question. The following section illustrates the shift by depicting the five specific components of the TA.

2 Overview of the Telecommunications Act 2001

(a) Telecommunications Commissioner

The TA establishes the Telecommunications Commissioner, within the CC. The Commissioner is responsible for regulating the telecommunications industry, including:

- a) dispute resolution concerning compliance with access obligations for access services;
- b) making recommendations to the Minister of Communications on access services and the industry; and
- c) monitoring and enforcement of the KSO.

NZ’s first Telecommunications Commissioner was Douglas Webb.³⁰

²⁹ The National-led Government commenced sector-specific electricity reforms in 1998, furthered by Labour in 2001.

³⁰ Ross Patterson is the second Commissioner.

(b) The Access System

Interconnection access is the main focus of the TA, reflecting the history of dispute through the 1990s. The TA proscribes interconnection and wholesaling to enable competitors to access Telecom's network and retail services, based upon the concepts of designated and specified services. Designated services are split into access services (where bilaterally, an access provider provides a service to an access seeker) and multi-network services (which involve more than two access providers) (Eeles, 2001). In particular, the designated access services focus on interconnection with Telecom's PSTN and Telecom's retail services. Table 2.1 details the full range of designated access services, designated multi-network services, and specified services regulated by the access regime:

Table 2.1: Telecommunications Services regulated under Part II of the TA

Designated Access Services
Interconnection with Telecom's fixed PSTN
Interconnection with other PSTN other than Telecom's PSTN
Retail services offered by means of Telecom's fixed telecommunications network
Residential local access and calling service offered by means of Telecom's fixed telecommunications network
Bundle of retail services offered by means of Telecom's fixed telecommunications network
Retail services offered by means of Telecom's fixed telecommunications network as part of a bundle of retail services
Designated Multi-network Services
Local telephone number portability service
Cellular telephone number portability service
National toll-free telephone number portability
Telecom's fixed PSTN
Specified Services
National Roaming
Co-location on cellular mobile transmission sites
Co-location of equipment for fixed telecommunications services at sites used by Broadcast Communications Limited

The TA provides standard access principles:

- 1) The access provider must provide the service in a timely manner;
- 2) The service must be supplied consistent with international best practice;
and

- 3) The access provider must provide the service on terms and conditions consistent with how the access provider provides itself with the service.³¹

- (i) Dispute Resolution Process

Part II of the TA details a dispute resolution process. The TA emphasises the importance of commercial negotiations to resolve access disputes. There is no *a priori* right for the Commissioner to determine access prices. Where commercial negotiations fail, an industry participant must request that the Commissioner determine access prices and conditions. With regard to designated services, the Commissioner can make price and non-price determinations. For interconnection, the main pricing rule is TSLRIC.³² For specified services, the Commissioner is limited to non-price determinations. Separate determination processes exist for designated access services, specified services, multi-network services, and to review pricing determinations. Section 45 of the TA provides determination-specific timeframes for the CC.

- (ii) Purpose and Efficiency

Section 18(1) of the TA explains that the purpose of the TA is to “promote competition in telecommunications markets for the long-term benefit of end-users of telecommunications services”. By s 18(2), the Commissioner *must* consider the allocative, productive, and dynamic efficiencies that “will result or are likely to result from [the] act or omission” in promoting competition (MIT, 2000d, p. 43). In telecommunications, the efficiencies take the following characteristics:

³¹ TA 2001, Schedule 1, Subpart 2, Clause 6 provides for the following limitations on these standard access principles:

- 1) Reasonable technical and operational practicability having regard to the access provider’s network;
- 2) Network security and safety;
- 3) Existing legal duties on the access provider to provide a defined level of service to users of the service;
- 4) The inability, or likely inability, of the access seeker to comply with any reasonable conditions on which the service is supplied; and
- 5) Any request for a lesser standard of service from an access seeker.

³² See Appendix 2 for pricing principles available to the Telecommunications Commissioner.

- a) Allocative efficiency results from service providers utilising resources to produce the best range of services for end-users, with 'best' referring to the product set creating the most utility for the end-user;
- b) Productive efficiency refers to the least-cost industry production of products demanded by the end-user; and
- c) Dynamic efficiency is longer-term: "when service providers invest, innovate, and improve end-user services, increase relevant productivity, and lower production costs over some undefined time-period" (Snow, 1986, pp. 49-50).

The CC clarified that it favours long-term dynamic efficiency over the short-term allocative and productive efficiencies. The TA supports this approach as it focuses on 'long-term benefits to end-users' (CC, 2001, p. 22).³³

Thus, the TA addresses the access problem by mandating an access regime. In particular, in implementing Part II, the Commissioner must consider the purpose of the regulation ('competition in telecommunications markets for the long-term benefit of end users') and efficiency (the allocative, productive, and dynamic efficiency effects within the telecommunications market through promoting competition).

(c) The Telecommunications Service Obligation

Part III of the TA concerns the establishment of a new universal service scheme entitled the telecommunications service obligation [TSO]. By s 70(1), the purpose of the TSO is to:

facilitate the supply of certain telecommunications services to groups and end-users within New Zealand to whom those telecommunications services may not otherwise be supplied on a commercial basis or at a price that is considered by the Minister to be affordable to those groups of end-users.

Section 70(4) of the TA governs the establishment of a TSO instrument, by detailing what must be included in a TSO document, while ss 70-71 deem the existing KSO a TSO. The TSO system is considered more flexible than the KSO (Eeles, 2001),

³³ Efficiency is discussed later in this chapter in the economic theories of regulation.

as any “service provider” is able to meet the TSO. Thus, developing networks, such as TelstraClear’s urban network,³⁴ could become subject to a TSO instrument:

It is envisaged that TSO instruments will not only apply to services supplied by Telecom NZ. The idea is that services akin to those covered by the Kiwi Share Obligation will be subject to contestability, such that service providers compete for the right to be a service provider under a particular TSO instrument (Bowie, 2001).

Part III mandates determining the “net costs” of TSO service provision, detailing how to establish the ‘contributions payable’ by liable competing network operators. Contributions to the cost of TSO from other operators are based on market share and revenue. The calculation of contributions payable is complicated, and “fraught with difficulty” (Steeman, 2002; Bowie, 2001).

(d) General Network Regulation

Section 102(1) of the TA provides a framework for network operators to “facilitate entry into, and competition in, telecommunications markets”. This declaration provides certain powers of entry onto land for network construction and maintenance. Part IV also details rules of connection and misuse of a network.

(e) Self-regulation

A system of self-regulation under Schedule 2 of the TA enables industry forums to prepare telecommunication access codes in relation to designated and specified services. The Commissioner oversees the codes, varying or approving to ensure consistency with the interests of end-users. The TA prohibits certain codes including the implementation of pricing principles for designated access services or apportioning the cost of multi-network services (Eeles, 2001).

In summary, the TA constitutes a significant shift from the light-handed regime. The following section summarises the re-regulation of telecommunications.

³⁴ Please note that TelstraSaturn merged with Clear Communications in 2001 to form TelstraClear.

B Conclusion: The Context of Re-Regulation

The historical and political context of re-regulation illustrates that the Government concentrated on correcting past errors each of which provided the genesis for several targeted regulatory responses. Table 2.2 highlights the range of sector-specific regulatory responses.

Table 2.2: Government Responses to Failures of the Light-Handed Regime

<i>Concern:</i>	<i>Government Approaches to Dealing with Issue:</i>
Light-handed regulation	<ul style="list-style-type: none"> a) Sector-specific regulation regulating interconnection and wholesaling of designated and specified services; b) Establishment of Telecommunications Commissioner, funded by levy; c) Mandatory review of local loop unbundling (more heavy-handed regulatory option); and d) Broad powers allowing industry information gathering.
Interconnection: Telecom v Clear, “Baumol-Willig” pricing, and Telecom’s PSTN	<ul style="list-style-type: none"> a) Regulated interconnection and wholesaling of designated and specified services; b) Definitions of initial and final pricing principles. c) Clarification that the “Baumol-Willig” rule is not an applicable pricing rule in NZ; and d) Limited appeal rights and appeals to the Privy Council prohibited.
KSO	<ul style="list-style-type: none"> a) Continuation of KSO as TSO (requiring information disclosure, minimum coverage and service levels, etc); b) Detailed regulations requiring the costing of the TSO and recoupment of cost of compliance from competitors; and c) Mandatory review into local loop unbundling.

The re-regulated framework attempts to resolve the perceived failures of light-handed regulation by moving to sector-specific regulation under the Telecommunications Commissioner. The dedicated interconnection access regime, with pricing principles provides a solution to the interconnection disputes through the 1990s. The perceived KSO issue is resolved by introducing a TSO system with an annual net costing and proportionate contributions from liable industry players. Thus, in light of the historical and political context of the NZ experience, the next section illustrates the Chicago and Harvard economic influence in the TA.

C Chicago and Harvard Economics within the Telecommunications Act 2001

The Government's objectives for reform were: "Cost-efficient, timely, and innovative telecommunications services on an ongoing, fair, and equitable basis to all existing and potential users" (MIT, 2000d, p. 11). Section 18(1) explains that the purpose "is to promote competition in telecommunications markets for the long-term benefit of end-users of telecommunications services". In achieving competition, s 18(2) requires the Commissioner to consider the efficiencies that "will result or are likely to result ...". The inclusion of "existing and potential users" and "end-users" supports a Harvard interpretation. 'End-users' denotes competition as a means to an end, with the end being long-term consumer benefit. The Government's telecommunications objective concerns potential and future consumers, leading to issues of inter-generational equity in balancing current and future consumers.

However, despite the Harvard influence, the TA incorporates Chicago-style efficiencies (s 18(2) mandates the consideration of efficiency). Efficiency is complex, representing a measure of competitive efficiencies deriving from perfect competition (Frank, 1998, p. 418). However, the monopoly and natural monopoly tendencies of telecommunications are inaccurately reflected in perfect competition. Efficiency ignores deadweight losses arising from natural monopolies, which pertain to losses arising from structural market irregularities (Frank, 1998, pp. 357-425). The efficient pricing principal is MC (Frank, 1998, p. 418), but for monopolies MC is below AC, and is unsustainable in the long run (Snow, 1986, p. 241).³⁵ Figure 2.4, at p 36, illustrates that monopolist's price at AC (Frank, 1998, p. 417). Pricing above MC impacts on allocative efficiency, for the provision of end-user services will be less efficient. Second, natural monopolies indicate productive inefficiency, with economic rents in the

³⁵ The economic rationale behind MC below AC in telecommunication derives from the substantial cost investment in network creation. However, it is necessary to consider whether any of these costs are unavoidable. If unavoidable, and are not incurred by some service provision, then these costs are sunk costs, and should form no part of the efficiency calculation (Snow, 1986, p. 241).

provision of end-user services. Snow argues that these rents are not available in a competitive market (Snow, 1986, p. 241), while Frank argues, “by definition a natural monopolists costs *may* be lower than if other firms also served the same market” (Frank, 1998, p. 419). Third, the presence of economic rents and pricing above MC indicates dynamic inefficiency (Snow, 1986, p. 52). However, dynamic efficiencies are always partial, as they attempt to capture future potentialities (Vogelsang & Mitchell, 1997, p. 126). Thus, efficiency is complex: it is a competitive market analytical concept that does not counter the incumbent’s economic incentives and the natural monopoly characteristics (Gilbertson, 2001, p. 5).

This section illustrates the complexity of analysing the economic rationale of NZ’s competition law and telecommunications regulation. The regulatory approach over the last 30 years consisted of a hegemonic debate between Chicago and Harvard economics. Each school provides limited explanations of the regulatory model. The next section outlines the characteristics of public interest regulation and regulatory capture in the telecommunications context.

D Public Interest and Regulatory Capture: Telecommunications Act 2001

The TA includes aspects of both public interest and regulatory capture. “Public interest” regulation holds that regulation should operate like a public trust, preventing monopolistic telecommunications companies from earning supernormal profits through scarcity and high prices (Gilbertson, 2001, p. 4).³⁶ The “capture” school regards regulators as pawns, as the regulated can manipulate the regulator. Hence, regulation seeks to minimise the instances where regulators lose control (Snow, 1986, p. 7). The objective of the TA is to further the interests of existing and potential end-users (public interest regulation). However, the regulator relies on industry participants to provide

³⁶ A monopolist earns monopoly profits by charging where MC equals MR. However, a monopolist will always (bar a perfectly discriminating monopolist) exceed MR (Frank, 1998, p. 385-389).

regulatory information (which promotes regulatory capture). The following sections detail the components of public interest and regulatory capture.

1 Public Interest Regulation

Public interest regulation endeavours to ‘protect’ the public from inefficient markets, exploitation, and fettered access:

regulation is supplied in response to the demand of the public for the correction of inefficient or inequitable market practices (Posner, 1974, p. 335).

The regulator is the neutral arbiter of the ‘public interest’, free from self-interest. The regulator:

does its best to regulate so as to maximise social welfare. Consequently, regulation is thought of as a trade-off between the costs of regulation and its social benefits in the form of improved operation of markets (Scott, 2003, p. 448).

Regulation benefits society generally, rather than particular vested interests. Regulation should create confidence, despite Scott’s recognition of the balancing act between social costs and benefits of regulation. Thus, a problem with public interest regulation and infrastructure assets is that regulation may provide incentives to actors to act in a manner contrary to the intent of the regulation.³⁷

³⁷ For example, regulation may create incentives to cross-subsidise. Cross-subsidisation, like transfer pricing, occurs when operators transfer costs from a profitable business segment to another segment where consumers contribute to a higher fraction of costs. The networked nature of telecommunications presents a complex mix of subsidies and cross-subsidies (Snow, 1986, p. 148). There are two forms of cross-subsidies relevant to telecommunications: accounting and managerial cross-subsidies. Accounting cross-subsidies have been the traditional focus of regulatory regimes, including Canada, the EU, and the USA (Vogelsang & Mitchell, 1997, p. 197). Accounting cross-subsidies occur when a firm benefits from allocating costs incurred in service one to service two. The NZ Government mandated accounting separation following Telecom’s privatisation, but Gilbertson notes that Telecom merged business segments to avoid individual monitoring (Gilbertson, 2001, p. 5). Mandated accounting procedures fail to capture managerial cross-subsidies, which relate to managers making ‘real’ allocations of people and resources between services. For example, an incumbent may allocate its most inexperienced or under-performing personnel to service one, a high-cost, regulated service, while placing its best-performing personnel in an unregulated activity, so that the unregulated service runs more efficiently earning a greater profit share. Controlling managerial cross-subsidies is difficult, as attempting to do so involves substituting the regulator’s judgment for the firm. Laffont and Tirole warn, “it is by no means easy to prevent cross-subsidies once one has created incentives for them” and that cross-subsidies can hinder competitive development (2000, pp. 146-147).

(a) Public Interest Regulation and Infrastructure Industries

Government rhetoric claimed that telecommunications re-regulation was in the public interest reinforced through the s 18(1) “long-term benefit of end-users of telecommunications services” purpose statement. Relevant questions include: Is the regulation in the public interest? Are the regulatory instruments and bodies empowered to act in the public interest? For Mansell, ‘public interest’ is an undefined concept in relation to telecommunications, due to traditional State ownership (Mansell, 1993; 1996; 2007). ‘Public interest’ was traditionally identified with the State, as the State was ‘representative’ of the public. Following deregulation and privatisation, ‘public interest’ was linked to the market and to technological criteria including the promotion of competition and the establishment of network standards, rather than establishing criteria emphasising equality of access to the network (Mansell, 1996; 2007).³⁸

“Public interest” reflects positivistic or normative standpoints. For legal positivism, law purports to obligate acting in the ‘public interest’. Law tells us what we *must* do, (often) requiring us to act contrary to our self-interest, in other’s interests, or in the public interest more generally. Bentham applied an aggregative definition to public interest, arguing that public interest was merely the sum of the interests of individual citizens (Bentham, 1843, p. 2). The aggregation principle is critiqued as untenable ‘psychological hedonism’, lending itself to laissez-faire individualism incompatible with social responsibility and a strong sense of community. Equally, what happens if interests are irreconcilable? Some interpretations of Bentham suggest that it is not that

³⁸ To date, there have been few comments by NZ’s judiciary on the ‘public interest’. In India, for example, the Supreme Court held in *Kasturi Lal Lakshmi Reddy v State of Jammu and Kashmir* 1980 (3) SCR 1338 that:

... the concept of public interest must as far as possible receive its orientation from the directive principles. If any governmental action is calculated to implement or give effect to a directive principle, it would ordinarily be subject to any overriding consideration formed in the public interest.

interests are the same, but rather that the population seeks the same general range of interests (Gunn, 1968).

The normative 'public interest' asserts what the concept should mean in regulation. In defining 'public interest', common ideas include "public good", "public welfare", "general interest", and "in the interests of the community". These terms are capable of varying interpretations, involve judgment, and require information outside of the regulatory process in order to evaluate public good, welfare, or interests. For infrastructure, regulation should represent society's interests rather than the private interests of regulators.

Many public interest definitions emphasise 'common interest', shared by all citizens. Meyerson and Banfield describe special interests and the public interest as follows:

A decision is said to serve special interests if it furthers the ends of some part of the public at the expense of the ends of the larger public. It is said to be in the public interest if it serves the ends of the whole public rather than those of some sector of the public (Meyerson & Banfield, 1955, p. 322).

Critics dispute the notion of a 'common interest' by recognising inherent power imbalances, and instead, link public interest to democracy, arguing that it equals consensus among the 'majority' of people:

The concept of public interest is closely related to the universal consensus necessary for the operation of a democratic society. This consists of an implicit agreement among the preponderance of the people concerning two main areas: the basic rules of conduct and decision-making that should be followed in the society; and general principles regarding the fundamental social policies that the government ought to carry out (Downs, 1962, p. 10).

Marks describes 'public interest' as a balancing of interests, in that the 'public interest' is "... the sum total of all interests in the community – possibly all of them actually private interests – which are balanced for the common good" (Marks, Leswing & Fortinsky, 1972, p. 211).

For political economists, power struggles and welfare inequalities are at the centre of 'public interest' analysis, as is the interaction between regulatory, economic, political, legal, and technological forces. Horwitz argues that the interpretation of 'public interest' is crucial in defining State action, including the role of regulatory agencies (1989). For telecommunications regulation, the development of competition and increasing efficiency in the 'public interest' justify the State's regulatory role (Horwitz, 1989). In Horwitz's analysis of the divestiture of AT&T in the USA, the 'public interest' was a balance of interests: "[a] black box whose meaning or representation is the terrain of struggle", which redefined public interest from "a concern with stability and a kind of social equity to a concern with market controls and economic efficiency" (Horwitz, 1989, p. 131). Powers suggests that telecommunications deregulation tends to generate efficiency gains and new services, but recognises the unequal distribution of benefits and costs throughout society, particularly for rural and residential consumers (Powers, 1987).

The underlying tension for Downs is that if the 'public interest' exists, who possesses the ability to balance 'public' interests?

The idealist school believes that the public interest consists of the course of action that is best for society as a whole according to some absolute standard of values, regardless of whether any citizens actually desire this course of action ... Public opinion need not understand the wisdom of the policies arrived at (Downs, 1962, p. 26).

Thus, regulation is political:

The essential commodity being transacted in the political market is a transfer of wealth, with constituents on the demand side and their political representatives on the supply side ... the market here, as elsewhere, will distribute more of the good to those whose effective demand is the highest (Peltzman, 1976, p. 212).

Gerboth, in agreement, states that:

When a decision making process depends for its success on the public confidence, the critical issues are not technical; they are political ... In the face of conflict between competing interests, rationality as well as prudence lies not in seeking final answers, but rather in compromise – essentially a political process (Gerboth, 1973, p. 497).

At the crossroads of regulatory and legal theory, ‘public interest’ becomes “a process, and not a policy”: namely substantive due process to ‘account’ for the value judgments as to what constitutes ‘public interest’; and procedural due process to ‘account’ for how value judgements are arrived at. Burkhead and Miner explain:

In administrative law it is usually impossible to define substantive due process, but it is not as difficult to define procedural due process. If this analogy is appropriate, it should be possible to define a procedural public interest, even though its content cannot be specified. A procedural public interest would consist of an assurance, in the decision process, that the widest possible range of interests will be consulted. This consultation will assure that the intensities of preferences are revealed, even if these cannot be measured with precision. The aesthetic cost of destroying a scenic wilderness cannot be compared with the value of power and water to be produced from a reservoir, but the intensity of reaction of affected groups can at least be assessed. A procedural public interest would both establish the values that underlie the public interest and reveal the consequences of alternative policies. The rules of the game are important, not just the specific, isolated outcomes (Burkhead & Miner, 1971, p. 232).

This debate suggests that there is little consensus in public interest regulation. As the following section demonstrates, public interest regulation is criticised by regulatory capture theory.

(b) Criticisms of Public Interest Regulation

Critics challenge the ability for regulators to shed individual interests in favour of a ‘public interest’. Furthermore, the concept of ‘public interest’ is a rhetorical tool for actors to legitimise their actions at the expense of others. Economists criticise the ‘public interest’ view as simplistic by overstating the:

- a) fragility and inefficiency of economic markets (McNamara, 1991, p. 96);
- b) assumption that regulation is virtually costless (Posner, 1975, p. 819); and
- c) that there is a public interest, or that legislation is able to reflect a public interest (Posner, 1974, p. 344).

Posner states:

[There is] a good deal of evidence that the socially undesirable results of regulation are frequently desired by groups influential in the enactment of legislation setting up the regulatory scheme ... Sometimes the regulatory scheme itself reveals an unmistakable purpose of altering the operation of markets in directions inexplicable on public interest grounds ... Much of it is consistent with the rival theory that the typical regulatory agency operates with reasonable

efficiency to attain deliberately inefficient or inequitable goals set by the legislature that created it (Posner, 1974, p. 337).

Thus, ‘public interest’ is ‘meaningless’, with powerful groups receiving the ‘public benefits’:

Since the coercive power of government can be used to give valuable benefits to particular individuals or groups, economic regulation – the expression of power in the economic sphere – can be viewed as a product whose allocation is governed by the laws of supply and demand ... economic regulation is better explained as a product supplied to interest groups than as an expression of social interest in efficiency or justice (Posner, 1974, p. 344).

These criticisms introduce regulatory capture theory.

2 *Regulatory Capture*

Regulatory capture theory holds that irrespective of the underlying ‘rationale’ behind regulation, self-interested groups capture and control the regulatory process:

The original purposes of the regulatory program are later thwarted through the efforts of the interest group (Posner, 1974, p. 342).

Regulatory capture demonstrates where the regulated dominate the regulator (Posner, 1974). This is a central tenet of the economics of regulation, which critiques ‘public interest regulation’ (Laffont & Tirole, 1991; Levine & Forrence, 1990). Examples of regulatory capture in the USA include:

- a) The Civil Aeronautics Board providing competitive protection to airlines;
- b) The Interstate Commerce Commission preventing competition developing in transportation, colloquially known as the “trucker’s best friend”; and
- c) The Department of Agriculture implementing farming policies favouring large corporate farmers over small-hold farmers and consumers (Laffont & Tirole, 1991).

There are two approaches to the capture school: a demand-side and a supply-side model (Stigler, 1971; Peltzman, 1976; Laffont & Tirole, 1993). The central premise is ‘joint relationship maximisation’, where concerned parties maximise utility through controlling the regulatory process.

(a) Demand-Side Regulatory Capture

The demand-side model holds that political institutions respond to ‘constituents’ based upon demand patterns, voting capacity, and financial interests. As Government is risk averse, it will try to avoid conflict. Thus, during the 1999 General Election, there was considerable public disquiet surrounding telecommunications: regulatory reform was on the political agenda, and the public disquiet represents ‘organised demand’. The Government appeased these ‘interest groups’ by passing the TA. A demand-side model tends to treat the political process as “a black box”, which is problematic as legislation can be revised or removed through lobbying by alternative interest groups (Laffont & Tirole, 1993, p. 477). In contrast, the supply-side model of regulatory capture presents a complex regulatory environment.

(b) Supply-Side Model of Regulatory Capture

The supply-side model explains the complex pattern of regulatory development by acknowledging multiple interests facing Governments, in supplementing the demand-side. Through organisational economics, supply-side models illustrate that institutional arrangements affect regulatory outcomes. This enables capture theorists to explain the political insecurity confronted by interest groups, who may get some but not all of their demands. The model relies on complex agency theory, with Government disaggregated into an immense web of principal-agent relationships (Laffont & Tirole, 1993, p. 491). While acknowledging public pressure as a genesis for telecommunications regulation, a supply-side model would suggest the presence of alternative interest groups, as the CC relies on industry participants for almost all information in the regulatory process.

3 *The Insights of Public Interest Regulation and Regulatory Capture*

The TA is a form of public interest as the regulatory objective is to further the interests of existing and potential end-users. However, this is hindered by the struggle over the complexity of the meaning of ‘public interest’. Thus, the “capture” school identifies opportunities for the regulated to manipulate the regulator: e.g. as the regulator must rely on industry participants for information this promotes regulatory capture. Therefore, each theoretical influence informs part of NZ’s regulatory approach to telecommunications, but each theoretical insight, in isolation, possesses limited explanatory power.

VIII THE LIMITS OF EXISTING REGULATORY THEORY

Each theoretical perspective, Chicago and Harvard schools, public interest regulation, and regulatory capture, illustrates *part* of the complexity of NZ’s telecommunications regulation:

- a) Chicago economics was an important hegemonic movement through initial competition law reforms (1987-1999). Neo-liberalism influences competition law, although there are attempts to minimise its impact. Thus, Chicago provides an insightful account into tensions within the regulatory environment, but is analytically limited by its theoretical foundations.
- b) Harvard economics is promoted as *the* economic theory underpinning re-regulation in NZ. However, although much rhetoric surrounds ‘consumer welfare’ economics, it struggles to have impact on the regulatory schema, troubled by Chicago and trapped by its limitations, particularly around ‘welfare’.
- c) Public interest regulation is hindered by struggles over the complexity of the meaning of ‘public interest’, and thus the account is too simplistic in its conception of ‘public’, ‘interest’, ‘regulator’ and ‘regulation’.
- d) Regulatory capture theory, especially in its links to regulatory communication, provides some insight into the NZ model in identifying the scope for capture.

However, the conflict between the accounts is appealing. The regulatory theories illustrate that economics is tied to the social and political: e.g. the Chicago-Harvard

debate illustrates the role of the CC as a political actor. Economic movements play a role in telecommunications, but it is a complex, conflictual role. This illustrates the need for a theoretical account with space to incorporate economic, social, and political elements.

IX CONCLUSION

In summary, this chapter characterised the historical and political genealogy of telecommunications regulation in NZ, by tracing the movement from light-handed to sector-specific regulation and the theoretical insights of key economic regulatory theories:

- The light-handed system implemented subsequent to the deregulation and privatisation of Telecom failed to manage the network interdependence and rapid technological change. The Chicago focus argued that the efficacy of markets to correct market irregularities.
- In developing competition, network interconnection is vital. However, Telecom used its position to prevent and delay the establishment of competition.
- The Privy Council in *Telecom v Clear* accepted the Baumol-Willig rule, which allowed Telecom to charge monopoly rents in negotiating interconnection access.
- There was increasing political and public disquiet through the 1990s. Increasingly, Government agencies turned to accounting information as a regulatory mechanism.
- The 1999 General Election presented an opportunity for change, and the newly elected Government established the MIT to recommend appropriate telecommunications regulation. The MIT concentrated on the need for competitive interconnection access and the KSO.
- The sector-specific TA 2001 established the Telecommunications Commissioner, provided a dispute resolution process for interconnection access based upon TSLRIC, and required an annual net costing of TSO.
- The TA 2001 invokes a complex mixt of regulatory theories, incorporating elements of a Harvard, Chicago, public interest, and regulatory capture.

The contingent explanations of telecommunications regulation illustrates that regulatory theory is intimately linked to the social and political. Consequently, Chapter three takes the illustration of economics as part of a richer, political game and considers its implication in relation to the interface of law and accounting. As indicated, the TA 2001 requires a substantial range of cost information. Cost, traditionally, is the measure of economic sacrifice, but if economic cost can be linked to the social and political, then the regulatory use of cost accounting information increases the complexity of the interface of law and accounting.

- Chapter Three -

The Interface between Law and Accounting: Cost Theory

Not everything that can be counted, counts. And not everything that counts can be counted.
Albert Einstein

I *CHAPTER THREE OVERVIEW*

Chapter two introduced telecommunications sector-specific regulation, and considered the limited economic regulatory theory explanations of the genealogy from deregulation and privatisation through to sector-specific reform. Thus it is necessary to move beyond current theories to explain telecommunications regulation. For Horwitz, there are three main areas of regulatory theory: economic, historical, and political science (1989). He argues that economic analysis provides insight into measuring outcomes but will misconstrue origins and processes; the historical approach provides insight into the historicity of regulation but lacks analytical tools for considering outcomes; and traditional political science politicises the regulatory environment but inclines to process-oriented analysis (Horwitz, 1989). For Horwitz, an ‘insightful’ regulatory model is interdisciplinary, incorporating the economic, historical, and political, as regulation is ‘evolutionary’, responding to economic and political developments with unique structural components, challenges, and public interests (Horwitz, 1989, p. 1). Thus, an account of telecommunications re-regulation should recognise its historical, economic, and political aspects. Chapter three addresses this by examining the increasing interface of law and accounting to answer three central questions:

- 1) What is the theoretical and empirical interface between accounting and law? Specifically, what is the role of accounting in telecommunications regulation? What is the role of cost and cost theory within legal regulation?
- 2) Why did the Government incorporate cost-based regulation (TSRLIC for interconnection access pricing and net costing for the TSO)? What arguments did the Government and its agents present for instituting cost as the regulatory focus?

- 3) What is cost? Specifically, what are the technical, methodological, and political challenges of using cost in telecommunications regulation? What are the limitations and consequences of the assumptions of economics and law in relation to ‘cost’ accounting?

This chapter identifies the increasing use of cost as a regulatory tool. However, public policy makers, Government, lawyers, and economists when using costs tend to accept the assumptions of positivism despite accountants being aware of the problems associated with cost, which include arbitrariness, choice, contestability, social and institutional constructionism, and subjectivity. Consequently, in tracing the interface of law and accounting, this chapter considers the effect of ‘positivist’ assumptions within regulation. However, before this the next section reviews empirical and theoretical work on the interface of accounting and law.

II THE INTERFACE OF LAW AND ACCOUNTING

The TA signalled a diversion from light-handed regulation, introducing a sector-specific regime and providing a forum for interconnection access and monitoring TSO compliance.³⁹ The increasing regulatory reliance on accounting information was signalled prior to the TA: the Telecommunications (Disclosures) Regulations 1999 required detailed accounting disclosures, e.g. Telecom had to disclose the net economic cost of complying with KSO obligations.⁴⁰ However, the TA comprehensively adopted accounting information as a regulatory measure, requiring the Telecommunications Commissioner to employ TSLRIC as the final pricing principle in regulating interconnection access and mandating an annual ‘net costing’ in monitoring TSO compliance. The chapter then moves to problematise the interface of law and accounting by considering the theory of cost. The challenges of costing from an

³⁹ Sections 70-71 of the TA deem the existing KSO a TSO.

⁴⁰ See Appendix 1 for the KSO net costing requirements in the Telecommunications (Disclosure) Regulations 1999.

economic perspective require an analytical framework at methodological, technical, and political levels to detail the shift from cost as technical to political and its implications for its interface with law and regulation.

A Cost and Regulation: No Interconnection Panacea for Telecommunications

In examining the interface of law and accounting in telecommunications, the nature and extent of accounting information needs, and the potential for dispute, is immense, e.g. the dispute surrounding the first interconnection price using the TSLRIC model. In August 2002, the Telecommunications Commissioner's first draft determination for interconnection prices recommended that accessing Telecom's PSTN should fall within 1.21 to 1.42 cents per minute. The first step in constructing the TSLRIC price was to benchmark eight comparable countries using cost-plus pricing. The CC benchmarking exercise produced a price range of 0.4 cents to 2.67 cents with NZ's interconnection price in the upper third quartile. Both Telecom and TelstraClear objected to the TSLRIC price, arguing it was incorrect. Telecom claimed that the price was low and should at least be doubled, arguing for an interconnection price at the upper end of the fourth quartile of 1.42 to 2.67 cents. As the TA requires the Commissioner to give primacy to commercially negotiated settlements, Telecom submitted that the Telecom-Vodafone interconnection agreement of 2.6 cents per minute should have substantial weight before the CC. Telecom warned that incorrect interconnection prices would be detrimental and unsustainable due to NZ's higher costs of network provision associated with difficult terrain and sparsely populated rural areas.

TelstraClear counter-submitted that the interconnection price should at least be halved to enable full competitive development arguing for 'the more appropriate' price of 0.67 cents a minute, calculated by the "purchasing power parity" method. TelstraClear criticised the CC's rejection of this and criticised the CC's averaging of

certain USA States by arguing that these States should be de-averaged and considered separately. TelstraClear argued for the CC giving primacy to the “purchasing power parity” method, as “[it] was used by almost every telecommunications regulator” (Steeman, 2002a). TelstraClear argued the CC should not be concerned with a potentially large adjustment in Telecom’s interconnection price but should consider the impact on Telecom’s competitors if the price is too high. Mr Grant Forsyth, general manager of TelstraClear’s government relations stated: “[n]ew entrants have been horribly stifled by rates charged to us by the incumbent” (Steeman, 2002b).

This dispute illustrates the central concern of this thesis. The Government promised that the TA would solve problems of the light-handed regulatory regime by providing an interconnection access regime. All interested industry parties were consulted on the introduction and construction of the TSLRIC model; Telecom and TelstraClear submitted their estimates of the interconnection price and costing information to the CC. However, there is still disparity in the expected interconnection price from the TSLRIC model. In short, cost accounting does not solve problems of telecommunications regulation, with repercussions for the interface of law and accounting.

B The Interface between Law and Accounting

Law and accounting are intertwined. The two disciplines increasingly become closer and the interface continues to grow. There are three main aspects to the interface: 1) law provides a framework for accounting; 2) accounting produces information for the legal process; and 3) at rare intervals, law passes judgment on accounting. Napier and Noke acknowledge that the relationship is multidirectional and multifunctional as each discipline influences the other (Napier & Noke, 1992, p. 32).

Law provides a framework for accounting: first, in the day-to-day practice of accounting; and second, through law's influence over accounting's scope (Napier & Noke, 1992, p. 32). Law defines parameters for the operation of accounting: e.g. Parliament designated the Accounting Standards Review Board [ASRB] as the authority to promulgate the delegated legislation of the NZ International Financial Reporting Standards [NZIFRS] and their equivalents, which provide legal guidance in the preparation of financial reports.⁴¹ The influence of law continues to develop as much accounting works "within particular legal structures" (Napier & Noke, 1992, p. 31): financial reporting, tax, audit, trusteeship, and insolvency require knowledge of relevant law. Law's role in shaping accounting is reinforced through education: e.g. to qualify for chartered accountancy in NZ accounting students must study commercial law (contract and company law).

Accounting is a common source of information in legal disputes and is a powerful media of expression. Consequently the interrelationship between the disciplines increases in significance (Napier & Noke, 1992, p. 30). There are two trends in law's use of accounting: 1) aspects of law and accounting compete, intersect or overlap: e.g. tax, industrial relations, auditor's liability, and perhaps intellectual property; and 2) many legal processes require a wide range of accounting information to function, e.g. in contract, conveyance, banking, company law, insurance, and torts. In legal processes, accounting information plays important roles in the law of trusts, partnerships and companies; criminal prosecutions (especially fraud); negligence (damages); insurance, competition, consumer, insolvency, and banking law; matrimonial property, contracts, property valuation, employment law (collective

⁴¹ Parliament reserves the right under s 33 of the Financial Reporting Act 1993, subject to the Regulations (Disallowance) Act 1989, to disallow any approved financial reporting standard or to overturn a decision of the ASRB to revoke a previously approved NZIFRS. The right to overrule has not been exercised.

bargaining), and even public law (such as State Owned Enterprises and public funds) (Hadden & Boyd, 1992, p. 58). Thus, law increasingly *requires* accounting information.

Although the interface continues to grow, law rarely passes direct judgment upon accounting, its processes or information. For commentators, irrespective of the apparent simple marriage of the two disciplines, the root of conflict between the disciplines arises from the subordination of accounting to law (Hadden & Boyd, 1992, p. 57; Napier & Noke, 1992, pp. 31-32). Given the law's power to interrogate and adjudicate, its lack of interrogation and judgment concerning accounting is striking. Although an over-simplification, the legal process does not adjust to accounting information but rather law imposes its own framework and language around accounting: e.g. regarding auditor's liability the courts impose the common law framework of negligent misstatement (duty of care, breach of the duty of care, and damages) not the auditing language of significant error (Atkin *et al*, 2002). Within this framework, the legal process appears uncomfortable with notions of the auditor expectation gap,⁴² applying its own framework of negligence: reasonableness, proximity, and foreseeability (Atkin *et al*, 2002). However, whilst recognising the reluctance of law to interrogate accounting information, there is little foundation to Hadden and Boyd's claim of 'subordination' of accounting to law: both are respected, well regarded professions.⁴³ Historically, socially, culturally, and politically the disciplines are important and powerful, affecting the day-to-day life of citizens. Although their subject matter differs, their practice is similar (Moore, 1991, pp. 765-766), revolving around debate and opinion concerning a primary source: for law, legislation, case-based precedent, or a legal doctrine; for accounting, an accounting standard, accepted, or

⁴² See Chapter four for further discussion of the auditing expectation gap and the discussion of Napier's work below.

⁴³ This thesis is not directly concerned with the vast array of professional or professions literature (see Gerboth, 1973; May & Sundem, 1976; Dyckman & Zeff, 1984; Hines, 1988; Hines, 1991; Collison, 2003).

suggested practice. Remarkably, as the next section demonstrates, despite practical and theoretical similarities between the disciplines, there is a limited literature on the interface of law and accounting.

C Insights on the Interface between Law and Accounting

A limited body of research on law and accounting considers the boundaries of the interface, primarily focusing on practice (e.g. Moore & Sussman, 1931; Moore, 1991; Freedman & Power, 1992; Bromwich & Hopwood, 1992; Laughlin & Broadbent, 1993; Gangolly & Hussein, 1996; Power & Laughlin, 1996; Napier, 1998; McCrudden, 1999; Preston & Vesey, 2008). Four areas of work examining the interface of the disciplines deserve especial attention.

First, Bromwich and Hopwood's edited collection of essays on the interaction between accounting and law (1992)⁴⁴ is exploratory, focusing on accounting regulation. Although *interdisciplinary* with work by legal and accounting academics and practitioners, little is done on identifying interconnecting or explanatory theory or critiquing interaction between the two disciplines. The chapters by Bromwich and Hopwood and Hadden and Boyd discuss the pragmatic intertwining of the professions, with Napier and Noke considering the historical relationship between accounting and law, tracing the growth, compatibility and close 'working relationship' between the professions. In noting that, "the respective claims of the accountants and lawyers to professional expertise have been expanding, bringing the professions into increasing commercial rivalry" they argue that:

Conflict has arisen as accountants, aware that their subordination to law may have an inhibiting effect on the development of accounting, have appealed to alternative paradigms for their theories (Napier & Noke, 1992, p. 31).

⁴⁴ Twelve of the thirteen essays were originally prepared and presented at the Sixth Deloitte Haskins and Sells and the Institute of Chartered Accountants in England and Wales Accounting and Auditing Research Symposium, held on 26 and 27 September 1988 at the London School of Economics.

There is tension about the source of rules for corporate financial disclosure: a tension between legally regulated accounting and internally regulated accounting. There is also dispute over the role of the auditor, as law ignores auditing codes of conduct, practice, and ethics, imposing a ‘duty of care’ and civil damages for negligence (Napier and Noke, 1992, pp. 31-32).

Second, Napier’s 1998 historical study differs from the plethora of auditor’s liability work by considering the interface of the disciplines in the attribution of liability with reference to the UK case, *Caparo Industries v Dickman* [1990] 2 AC 605 (HL Eng). Napier considers how historical change and the development of accounting and auditing influenced the law on auditor’s liability, noting the changing role of the company (1998, p. 112). Napier depicts two alternative models of the company: ‘concession theory’ and the ‘business company’. In analysing *Caparo*, the decision reinforces concession theory, where a company is ‘no more than its members’.⁴⁵ Napier argues that the ‘crisis in auditor’s liability needs a solution’, as auditors are effectively open to unlimited liability.⁴⁶ In general, Napier’s framework provides a useful source for analysing the regulation of utilities by illustrating the impact of different judicial influences on accounting information. The act of adjudication is practically and theoretically influenced by conceptions of the firm.

Third, there is literature on the Habermasian doctrine of juridification, which is:

a process in which human conflicts are torn through formalization out of their living context and distorted by being subjected to legal processes (Habermas, 1986, p. 203).

This concerns laws’ continued capture of social relationships (beyond the scope of the modern welfare State). For Habermas, there are stages (‘thrusts’) of juridification: 1) the

⁴⁵ This rejects the ‘business company’ model, which characterises shareholders as transient, solely interested in their investment and less interested in the company *per se*.

⁴⁶ Napier is incorrect with respect to the unlimited liability thesis. Liability is limited, in the fashion of the seminal case of *Hedley Byrne v Heller* [1964] AC 465 (HL Eng), as the UK position for auditor’s liability requires an auditor’s direct unqualified advice and reliance.

bourgeois State; 2) the bourgeois constitutional State; 3) the democratic constitutional State; and 4) the Social Welfare State (Habermas, 1986, pp. 205-209). Juridification is relevant as it theorises the proliferation of law, judicial expropriation of conflict, the depoliticisation of society, and law's incessant introduction to social institutions including accounting (Teubner, 1986, p. 24). Miller comments that:

The ubiquitous process of juridification in the modern industrial society has, at the same time, led to a judicialisation, not only in matters of the state, but in all social relationships ... (Miller, 2004, p. 587).

The Habermasian concern is not the increasing role of legal institutions in a juridified society but the shift of policy-making authority from political, democratic representatives to an unaccountable, unrepresentative judiciary (Teubner, 1986, p. 24). Hence, Laughlin and Broadbent claim the increased use of law tied to accounting moulds social systems, such as in the public sector, i.e. legislation constitutes "juridification at work" (1993). They look at the political use of law in 'active partnership' with accounting in health and education legislative reform and how this coupling extends the influences of both. Here law and accounting work for a common purpose.

Finally, Preston and Vesey's historical narrative concerning US utility regulation and the electricity industry from 1882 to 1944 (2008) is an important turn in the study of the interface of law and accounting. The three-phase study first examines the challenges for engineers in understanding the complexity of 'cost' in generating and distributing electricity, before moving to study how entrepreneurs then used this 'institutional accounting' knowledge to dominate the early US electricity market. The final phase is important in its analysis of how accounting became the centre of conflict between regulators and regulatees in the US courts. The analysis of a series of regulatory judgments, which began by recognising the 'information primacy of accounting', culminates with a 1944 Supreme Court ruling displacing accounting in

favour of regulatory economics. In Preston and Vesey's analysis, this decision resulted in accounting being taken-for-granted and matter-of-fact. This is a unique turn in the literature as it takes as its starting point that accounting, law, and regulation in combination shape utility regulation as opposed to merely reflecting regulatory processes. However, although there is little attention on the 'politics' between the disciplines of law, accounting, and economics, the paper provides a solid platform for the analysis that this thesis undertakes.

Thus, there are three lessons to draw from this. First, law and accounting are intertwined; second, the interface is pragmatic and theoretical; and finally, both disciplines pragmatically and theoretically learn from the interface between them. Before analysing the interface between law and accounting it is necessary to demonstrate the centrality of accounting (particularly cost) in telecommunications regulation in NZ.

III THE INTERFACE OF LAW AND ACCOUNTING IN THE TELECOMMUNICATIONS ACT 2001

The TA makes accounting a vital component in regulating telecommunications, especially in resolving interconnection access and monitoring TSO compliance. In particular, the regulatory regime establishes cost as the primary control mechanism (through TSLRIC and net costing of the TSO).

A Accounting Information in the Telecommunications Act 2001: Methodological, Technical, and Political Issues

1 The Extent of Accounting Information in Regulating Interconnection Access

The Act specifies that competitors must be able to interconnect with competing networks. An access seeker may apply to the Commissioner to determine interconnection terms with Telecom's fixed PSTN "in the event" that they cannot

commercially negotiate an interconnection agreement. Section 45 prescribes benchmarking interconnection prices with comparable countries that use ‘forward-looking cost-based pricing method’ as an initial pricing principle, with TSLRIC as the final pricing principle.

Consequently, the role for accounting information is extensive at methodological, technical, and political levels: e.g. parties disputed the meaning of ‘benchmarking’ and ‘comparable countries’ and how to calculate a ‘benchmark’, while at a practical level they disputed how costing information should be presented (i.e. averaged or de-averaged). Parties disagreed methodologically as to what factors should be included in a TSLRIC model and how TSLRIC should be calculated (as a bottom-up or top-down model). Practically, there was debate over cost information for maintenance and switching, costs of capital and carriage, and the Commissioner’s final price determinations.

2 *Accounting Information in Wholesaling*

Wholesaling is the “sale of telecommunications services at a discounted or wholesale price to other telecommunication services suppliers who then resell them to customers” (MIT, 2000d, p. 121). Access seekers can purchase retail services deemed “designated” from Telecom at a “wholesale” rate. The Commissioner determines the terms of the wholesaling agreement (including price) if the parties cannot negotiate an agreement. Consequently, accurate and detailed accounting information is vital. Generally, pricing for these services is “retail minus wholesale discount” (reflecting net costs saved). Accounting information and ‘economic efficiency’ determine the retail price on which the discount is based (either average or best price for the service).

3 *Accounting Information in Regulating the Telecommunications Service Obligation*

Part III mandates annual ‘costing’ of the TSO’s compliance costs. Accounting plays an important role in determining the ‘net cost’ of providing the TSO obligation by the TSO provider; competitor liability for the ‘net cost’ of the TSO based on market share, revenue, and turnover; and in calculating amounts payable by liable persons, implicating accounting methodologically, technically, and politically, as demonstrated in disputes over the type of costing model. Interested parties argued between Weighted Average Cost of Capital [WACC] and various Capital Asset Pricing Models [CAPM], and the ‘cost of compliance’. At a technical level, when the Commission chose a “simplified CAPM model” for costing the TSO, there was considerable disagreement over appropriate rates of WACC, cost of debt and equity, and the beta equity of capital to be applied.⁴⁷ Finally, after releasing the ‘net cost’ of satisfying the TSO, industry participants disagreed over the costing.

This brief survey of accounting in telecommunications regulation highlights its important role, and how it takes numerous methodological, technical, and political forms regarding evidential information, ‘accounting’ policy choices, and presentation. Consequently, the next section examines the emergence of accounting as the central regulatory tool in interconnection and the TSO and the arguments that the Government and its agents presented for this.

IV WHY INSTITUTE COST-BASED REGULATION FOR TELECOMMUNICATIONS: TSLRIC FOR INTERCONNECTION AND ‘NET COSTING’ FOR THE TSO?

Chapter two identified three key issues surrounding the re-regulation of telecommunications: the light-handed regulatory system; interconnection; and the KSO. In effect, the Government sought to re-regulate interconnection and the KSO through a combination of law and accounting, using a TSLRIC interconnection pricing model and

⁴⁷ See Appendix 3 for a breakdown of the accounting information required in the TSO process. This illustrates the complexity and centrality of the role of accounting information.

net costing for the TSO. But how and why was accounting implicated? This section traces the emergence of the proposed ‘re-regulatory’ measures (in the form of cost-based accounting regulation) to ‘solve’ the fundamental ‘failures’ that emerged from the light-handed regulatory period by examining the functioning of the MIT.⁴⁸ Following an ‘open’ inquiry into telecommunications the MIT was quick to focus on interconnection and the KSO as the primary regulatory issues, marking the emergence of accounting and ‘cost’ as a mechanism considered appropriate for regulation.

A The Ministerial Inquiry into Telecommunications

The Government established the MIT with a broad ambit and a promise of an open inquiry. The publication of the MIT’s Issues Paper challenged this openness and constricted the scope of the debate. It was the first comprehensive assessment of the Government’s objective for telecommunications and it confined the scope of regulatory conversation and pre-empted key elements of the final regulatory proposal. The ensuing analysis identifies key moments during the MIT when cost and accounting emerged as recommended mechanisms for telecommunications regulation.

1 Establishing the Ministerial Inquiry into Telecommunications: The Government’s Objective and the Terms of Reference

On 23 February 2000, Trevor Mallard, Acting Minister of Communications, announced the institution of the MIT noting the importance of effective telecommunications in NZ. Mallard announced the Government’s objective for telecommunications:

... to ensure that the regulatory environment delivers cost efficient, timely, and innovative telecommunications services on an ongoing, fair and equitable basis to all existing and potential users (MIT, 2000a, p. 1).

Mallard distanced the Government from a commitment to particular reforms by reinforcing the openness and independence of the MIT:

⁴⁸ This overview of the MIT, from establishment to conclusion, provides important context for the empirical material in Chapter seven.

... New Zealand's approach to telecommunications regulation is different from that adopted elsewhere in the world. We need to evaluate whether our current regulatory approach is in the best interests of New Zealanders for the future, and, if not what changes need to be made ... The Inquiry process will be open. I urge telecommunications consumers and the industry to make good use of the opportunity to make their views known (Mallard, 2000).

The MIT's terms of reference concentrated on the "communications revolution" as the genesis for regulating telecommunications rather than pointing to failures of the light-handed framework:

The world is experiencing a communications revolution ... New Zealand must position itself to meet the challenge of this revolution ... The telecommunications industry is of vital importance to the development of the information-based economy ... The ability of new telecommunications networks to interconnect fairly and efficiently with existing networks is critical to the development of competition (MIT, 2000a, p. 1).

Mallard appointed Hugh Fletcher, the former Chief Executive of Fletcher Challenge,⁴⁹ to head the MIT, with fellow Inquiry members Allan Asher, Deputy Chair of the Australian Competition and Consumer Commission [ACCC] and Cathie Harrison, a competition lawyer. The MIT received a broad ambit:

[t]he Inquiry was established to assess the regulatory regime for telecommunications, and recommend any changes. It has been asked to investigate and include particular comment on a range of issues, including:

- the environment for telecommunications network access and interconnection, including Telecom's 0867 initiative;
- the development of an information economy;
- the Kiwi Share obligations; and
- numbering (MIT, 2000a, p. 2).

On 9 March 2000, Fletcher announced the timetable for the MIT. Table 3.1 details the MIT's timeline for submissions and reports.

⁴⁹ Historically, Fletcher Challenge was one of New Zealand's largest companies. Fletcher is a well-recognised and respected businessman in New Zealand.

Table 3.1: The Ministerial Inquiry Timeline of Submissions and Reports

DATE	EVENT
7 April 2000	Issues Paper: Review of terms of reference; Identification of issues for submission and proposed solutions.
5 May 2000	Due: Submissions on the Issues Paper, which “will provide a key input into the ... Draft Report”.
30 June 2000	Draft Report: Analysis of solutions for issues identified in the Issues Paper.
24 July 2000	Posted: Submissions on MIT’s Website:
28 July 2000	Due: Submissions on Draft Report, which “will provide a key input into the ... Final Report”.
9 August 2000	Due: Public comments on Draft Report Submissions
11 August 2000	Posted: Comments on submissions.
14 August – 1 September 2000	Public Hearings: For interested stakeholders (Auckland, Wellington, and Christchurch)
29 September 2000	Final Report to Minister of Communications: Recommendation for telecommunications regulation.

The MIT’s first step was to publish the *Issues Paper*, which outlined the core regulatory issues: it reinforced the centrality of regulation and cost.

2 Ministerial Inquiry into Telecommunication: Issues Paper: 7 April 2000

The Issues Paper reviewed the terms of reference and identified particular issues confronting telecommunications regulation. The MIT commented on the Government’s objective for telecommunications:

The Inquiry takes ‘cost-efficient’ to mean that telecommunications services are produced at the lowest cost and delivered to consumers at the lowest sustainable price. ‘Timely’ is taken to mean the absence of barriers that would impede the implementation and uptake of innovative telecommunications services.

The requirement that these services be delivered on an ‘ongoing’ basis has important implications. The Inquiry takes this to mean that regulation should be forward-looking, robust, durable and consistent over time, and not sacrifice long-term gains for short-term considerations ... In achieving this, an important consideration is how the cost associated with meeting this objective is met, and by whom (MIT, 2000b, p. 7).

Consequently, the MIT introduced two key concepts that framed the ensuing debate: ‘robust’ and ‘cost’. The MIT focused on several regulatory issues including the KSO, but emphasised the centrality of interconnection for effective telecommunications:

... [Interconnection] is critical so that customers on different networks can communicate with each other ... Comprehensive, timely, efficiently priced interconnection with the incumbent’s telecommunications facilities is essential to enabling competitors to enter the market on a viable basis and deliver a high standard of services to consumers (MIT, 2000b, p. 13).

After outlining the approach to interconnection under light-handed regulation (including *Telecom v Clear*), the MIT outlined approaches to regulating interconnection pricing:

Different Regulatory Approaches

... World-wide, investments in telecommunications networks are proceeding on a massive scale ... The regulatory framework is a key determinant of the extent and efficiency of investment. In particular, interconnection prices play an important role in ensuring optimal investment. If they are set 'too high', they may encourage inefficient investment in network infrastructure. If they are 'too low', they may discourage efficient investment. If interconnection prices are regulated, it is important that they are set at a level that avoids these problems. This requires appropriate pricing principles, good information, and effective implementation (MIT, 2000b, pp. 7-8).

... Negotiated interconnection prices can take some of the following forms:

- payments for terminating and originating calls;
- bill and keep - each operator keeps the revenue from its own customers;
- revenue sharing - the operators share set proportions of the revenue from all calls;
- wholesale prices - the incumbent charges the entrant its retail prices less a discount; and
- cost-based - prices are set to cover costs and a return on capital.

There is, today, widespread international agreement that interconnection prices are most economically efficient if they are based on costs and are forward-looking. The final price would also include a mark-up to recover a reasonable share of an efficient operator's joint and common costs. Such an approach must, however, build on a range of judgements and assumptions. It is also demanding in terms of the data it requires (MIT, 2000b, pp. 13-14).

Consequently, the Issues Paper established 'cost-based' regulation as the most common and appropriate regulatory measure for interconnection, reinforcing the focus on cost:⁵⁰

- ...
3. What regulatory developments in other countries should the Inquiry consider? What constitutes best practice?
 4. Would these need to be modified to allow for factors specific to the New Zealand environment? (MIT, 2000b, p. 8).

...

 6. Does the current regulatory regime meet the Government's objective for the telecommunications services market? If the current regulatory regime will not achieve the Government's objective, what amendments to the policy and regulatory framework are needed in order to achieve the Government's objective? (MIT, 2000b, p. 10).

...

 13. What different means are there of establishing interconnection terms and conditions? Which of these means is the most efficient?
 14. Is there a need for regulation of pricing principles and other terms and conditions (such as service quality standards) for interconnection? If so, what principles?
 15. Should access prices be symmetrical between providers and identical across all providers?
 16. Should pricing principles include a specific pricing rule (e.g. Total Service Long Run Incremental Costs)? (MIT, 2000b, p. 14)

⁵⁰ There were 55 questions in total.

Thus, cost and interconnection shaped the regulatory agenda early in the MIT's process.

The KSO was different, as cost-based regulation received little consideration from the MIT. With respect to the KSO the MIT's terms of reference were broad:

Whether the Kiwi Share Obligations are the best means of meeting the Government's objective for residential telephone consumers and facilitating the ongoing delivery of telecommunications services, and if not what alternative arrangements should be put in place (MIT, 2000a, p. 3).

Consequently, the Issues Paper included extensive coverage of elements of the KSO including level of coverage, free local calls, static line rental charges, the Internet, effects on telecommunications, and social welfare implications. However, it appeared that cost-based regulation was not on the MIT's agenda:

The Inquiry is concerned to establish the minimum level of telecommunications services that should be available to all New Zealanders to meet the social objectives of the community for an information economy. Universal service obligations are part of most countries' telecommunications regulatory regime. Without such obligations, some services in some areas could be compromised or not provided, because they may not be sufficiently profitable in a purely commercial environment (MIT, 2000b, p. 10).

Of the MIT questions concerning the 'KSO' the questions focused on social welfare and the Government's objectives for telecommunications, except for question 34, which mentioned funding:

34. Should geographic price averaging continue to be the underpinning of a universal service obligation? If not, how should the obligation be funded? (MIT, 2000b, pp. 24-25).

The MIT indicated no interest in cost-based regulation for the KSO. From the beginning it signalled that cost was a necessary mechanism for regulating interconnection but not for the KSO. This directly affected submissions on the Issues Paper.⁵¹ The Inquiry received 64 submissions from interested stakeholders including

⁵¹ The Issues Paper and Draft Report submissions form an important part of the empirical analysis in Chapter Seven.

industry participants, interest groups, economists, accountants, lawyers, consultants, and the general public.⁵²

3 *Ministerial Inquiry into Telecommunications: Draft Report: 29 June 2000*

The most intriguing aspect of the Draft Report, released on 29 June 2000, was the MIT's apparent shift from supporting TSLRIC interconnection to supporting a 'bill and keep' methodology:

In the Inquiry's view, the most desirable approach to interconnection is 'bill and keep', where each network provider bills their own customers and keeps the revenue. Bill and keep is simple, and it avoids the need to enter into negotiations over an interconnection price. Implicit in the bill and keep approach is recognition by each operator that, over time, their costs will be roughly equal and, thus, there is no point in paying each other on a regular basis.

Bill and keep is used in other countries ... Given the possibility that payments may not be balanced over time, bill and keep may not be appropriate for all interconnection agreements ...

TSLRIC pricing, widely supported by leading academic research and best practice regulation, is sometimes referred to as calculating interconnection prices on the basis of "forward-looking costs". Such costs would include the direct costs of supplying the services, including the capital costs, as well as a share of common costs that are related to supplying the services in the long term ... of an efficient operator.

As a number of submissions pointed out, cost-based models (e.g. TSLRIC) are complex and take considerable time to build. In addition, they require numerous assumptions on which there can be legitimate differences of opinion. Thus, not only can cost-based modelling be expensive and take considerable time to complete, but agreement about the appropriate interconnection price can be difficult (MIT, 2000c, pp. 31).

Consequently, the Draft Report maintained the focus on cost, but indicated a shift in interconnection methodology.

The Draft Report recommended that Telecom should not be able to recoup the costs of the KSO over and above the access cost charged to competitors. The report centred on defining the parameters of the KSO by considering access deficits and Telecom's cost recovery as KSO provider:

An access deficit arises when revenues from line-related services (e.g. fees from connecting customers and from line rentals) are insufficient to recover line-related costs.

...

⁵² See Appendix 5 for a list of all submitters to the MIT and the Commerce select committee.

In New Zealand, there are no legislated constraints on line charges for non-residential customers but there are on residential customers through the Kiwi Share, which limits the monthly line rental charge. The Kiwi Share also requires Telecom to originate local calls from residences without charge and therefore prevents Telecom from recovering call-related costs for residential local calls.

...

Having regard to these factors ... it would appear that the Kiwi Share price limitation creates, or is likely to create, an access deficit for only a small proportion of residential users ... In acquiring Telecom when it was privatised, shareholders accepted this contingent liability, and subsequent purchasers have also. This exposure is undoubtedly offset by investors against the actual and contingent benefits of Telecom being the incumbent operator, such as those arising from ubiquity, the brand, customer inertia and the directories business.

...

The Inquiry notes that, in 1997, the United Kingdom telecommunications regulator (OFTEL) determined that British Telecom bore no undue financial burden as a result of its universal service obligation. OFTEL decided not to establish any funding mechanism for the universal service obligation on the basis that the benefits to British Telecom of being the incumbent operator (e.g. ubiquity and brand enhancement) were comparable with the estimated costs of providing universal service ... In considering designation of Telecom's interconnection services, the Inquiry's preliminary view is that Telecom should not be able to recover, in its charges for designated services, any cost for which it would not receive incremental revenue through providing the incremental service directly itself, rather than through a competitor (MIT, 2000c, pp. 49-50).

The MIT concluded the KSO commentary with the question: "Do you agree Telecom should absorb any access deficit?" (MIT, 2000c, p. 50). Costs and the KSO entered the agenda but the MIT showed reluctance to consider cost-recovery mechanisms. The MIT sought further comment, receiving 55 submissions on the Draft Report, and two cross-submissions from Clear Communications and Vodafone. The Inquiry scheduled public hearings and heard from 36 interested parties representing a broad constituency. The MIT delivered the final 131-page report on 27 September 2000 recommending regulatory reform.

4 *Ministerial Inquiry into Telecommunications: Final Report: 27 September 2000*

The Final Report reinforced the MIT's commitment to cost-based regulation for interconnection. However, in a further switch, the MIT argued that the default regulatory pricing model should be TSLRIC, noting support from leading academics and 'best practice regulation'. In recognising the complexity of TSLRIC pricing, the MIT recommended benchmarking of OECD countries that regulate "using a TSLRIC type methodology" for an initial determination, commenting that:

... a benchmarking approach would give a range of prices that could be ranked from lowest to highest by country or, as in the United States, by operator/state. A judgement would then be required as to where New Zealand should, at any time, fit with the ranking. The Inquiry recommends that this judgment be made by the Commissioner on the basis of his/her best estimate of where New Zealand would fall if a full TSLRIC assessment were undertaken ... (MIT, 2000d, p. 68).

After acknowledging the issue of KSO provision and cost, the MIT's Final Report recommended the maintenance of the existing KSO with no cost recoupment:

Telecom's interconnection prices should not include a contribution to any losses arising from the Kiwi Share obligations ... The proviso in the existing Kiwi Share, that residential line rentals should be capped unless overall profitability is 'unreasonably impaired', remains an appropriate mechanism for addressing any concerns that Telecom may have over the cost of the Kiwi Share obligations.⁵³ The Inquiry considers that Telecom would not be able to establish such a case today (MIT, 2000d, p. 5).

The MIT provided a detailed discussion of the 'costs' of the Kiwi Share, noting that:

Some submissions argued that it is not appropriate that Telecom continue to bear the full burden of meeting the costs associated with a USO. Other submissions, however, considered that it would not be appropriate to release Telecom from its Kiwi Share obligations 'for free' since this would confer a windfall gain on Telecom's shareholders (MIT, 2000d, p. 83).

...

The Kiwi Share limits increases in the monthly line rental for residential customers. The Kiwi Share also requires Telecom to provide an option whereby local calls can be originated from residences without charge and therefore prevents Telecom from recovering call-related costs for residential local calls ... For any individual residential access line, these constraints involve a net cost for Telecom when the revenue generated by the line is insufficient to recover the costs of maintaining that line and paying any interconnection charges arising from that line. Such loss-making lines are not necessarily restricted to rural areas.

...

Under recent information disclosure obligations Telecom will shortly be releasing an estimate of the losses it incurs in performing its Kiwi Share obligations in loss making areas. A preliminary estimate provided by Telecom is around \$100 million per annum. This has been calculated by Telecom using the methodology in the disclosure regulations, which excludes some revenue derived from customers of Telecom's fixed local-loop network. The estimate also includes a return on capital that may have no recoverable value if Telecom abandoned its customers in loss making areas. The \$100 million may therefore be seen as an upper estimate of the amount by which Telecom could increase its annual pre-tax profit in the complete absence of the KSO. Currently, except for a contribution from interconnection revenue related to fixed and common costs, Telecom's shareholders absorb whatever KSO loss there is ... It should be noted that, even if the KSO cost was industry funded or recovered through access charges and there was no pass on to retail prices, Telecom would still at this time bear the majority of the costs due to its size in the market.

...

⁵³ In acquiring Telecom when it was privatised, the Telecom shareholders accepted the KSO as part of the business of Telecom. At the time of purchase, though, an "out-clause" was negotiated, termed the "unreasonable impairment clause". The clause reads:

Telecom will charge no more than the standard residential rental ... provided that overall profitability of the subsidiary regional operating companies, as evidenced by their audited accounts, is not unreasonably impaired (MIT, 2000d, p. 88).

Having regard to these factors the Inquiry recommends that Telecom remain responsible for the Kiwi Share obligations and bear their cost until it can prove unreasonable impairment. The Inquiry also recommends that Telecom should be precluded from recovering any element of KSO losses in the supply of any of its services (MIT, 2000d, pp. 87-89).

Following the release of the Final Report and subsequent tabling in Parliament, the Government prepared a response. The next section considers events in Parliament leading to the passing of the TA.

5 *The Government's Response to the Final Report of the Ministerial Inquiry into Telecommunications*

The Government published its response to the MIT's Final Report on 20 December 2000. Paul Swain, Minister for Communications, commented that:

The new regime is forward looking. It concentrates on tomorrow's solutions rather than yesterday's problems. What we are announcing is designed to bring greater certainty, investment, competition, opportunity and consumer benefit ... I believe we have come up with a world leading piece of work (Swain, 2000a).

The Government accepted many MIT suggestions, particularly the recommendation for cost-based regulation of interconnection agreements:

The pricing principles to apply are:

- the cost-based pricing principle for interconnection with Telecom's network will be total service long run incremental cost (TSLRIC);
- the price for interconnection with the other network will be the price of interconnection with Telecom's network corresponding most closely to the nature of the other network (e.g. urban, rural); or a TSLRIC model; or bill and keep (where no payments are exchanged), if appropriate.
- where TSLRIC interconnection prices are required, each network will undertake its own modelling to estimate the price for interconnection with its network, with the Telecommunications Commissioner having the power to set the price (Swain, 2000a, p. 4).

However, there are differences between the MIT's and the Government's proposed regulatory plans regarding the KSO. Despite the MIT insisting that the existing disclosure regime was sufficient, the Government proposed cost-recoupment regulation, based on annual net costing:

Net costs of the Kiwi Share obligations

- Telecom will carry out an initial costing of the Kiwi Share obligations in accordance with a robust and transparent costing methodology (including auditing

and consultation with interested parties). The Telecommunications Commissioner will make a final determination on the level of any net operating costs.

Industry contribution to any net costs

- Telecom and other firms connected to Telecom's fixed network will contribute to any net operating costs of the Kiwi Share obligations.
- The level of each industry member's contribution will be determined by the Telecommunications Commissioner in accordance with an appropriate methodology, based on a share of relevant telecommunications revenue streams including mobile, long distance, data and local access. Approved shares will be recoverable by Telecom as a debt from other companies (Swain, 2000a, pp. 6-7).

In a section entitled "Telecommunications: Questions and Answers", the Government stated:

Why should industry contribute to the Kiwi Share costs?

Industry will only be contributing to net Kiwi Share costs if it is established that there are any costs (using a robust costing process). Industry currently contributes to the costs through a premium on interconnection. The proposed mechanism will replace this. It will be more transparent and competitively neutral, and will give the Telecommunications Commissioner the final decision over the calculation of costs and cost contributions. It is also linked to the enforcement mechanism, as the Commissioner will be able to withhold the industry contribution if Telecom fails to meet its Kiwi Share obligations (Swain, 2000a, p. 8).

The Telecommunications Bill was read for the first time in Parliament on 9 May 2001 where it was sent to the Commerce select committee for consideration. In Parliament, Swain stated that:

This is a watershed day for the telecommunications industry and consumers in New Zealand. It is a pioneering, forward-looking piece of legislation that concentrates on tomorrow's solutions rather than yesterday's problems, and is designed to bring greater certainty, investment, competition, opportunity, and consumer benefit ... (Hansard, 9 May 2001).

The select committee received 31 submissions from interested parties. Following hearings, the select committee proposed a series of amendments to the Bill and tabled its report in Parliament on 18 September 2001, with the Bill receiving its second reading. The Commerce Select Committee chairperson, David Cunliffe MP, stated:

It is with some pride that this bill comes back for its second reading today. It is a big bill, it is a complex bill, and it is a bill on which I think industry has lobbied more heavily than any other bill that I can remember in recent times ... The Minister has been able to bring along with this bill, up to this point at least, most of the industry (Hansard, 18 September, 2001).

With the Bill passing its third reading in Parliament on 18 December 2001, the Telecommunications Bill became an Act of Parliament encapsulating the regulatory

interface between law and cost accounting. Therefore, this invites analysis of the interface of law and accounting, which should reveal:

- a) How law and accounting work together? This thesis investigates this by examining the emergence of cost as a regulatory technology. Specifically, it continues to examine why TSLRIC for interconnection pricing and net costing for the TSO became the legislated regulation method; and
- b) Complexities and protocols surrounding the presentation, comprehension, and use of accounting information in the regulatory environment, and the capabilities of the regulatory environment to ‘handle’ the complexities of conflicting accounting information. This involves examining the rhetorical tools implicated in the presentation and use of accounting information by accountants, lawyers, and regulators.

Hence, the thesis considers the interface of law and accounting in relation to cost theory.⁵⁴ The following section illustrates that the wholesale adoption of cost as a regulatory mechanism is problematic. First, the term ‘cost’ is examined, then the technical and methodological challenges of costing within telecommunications, and finally, cost is considered from economic and socially constructed perspectives.

V *THEORY OF COST*

Cost is vital in modern discourse: cost, like accounting, is all around us, shaping many aspects of life including life itself, food, clothes, houses, travel, and relationships. Management accounting education focuses on cost concepts, classifications, and techniques, rather than ‘cost’ itself. However, cost is an intriguing concept, often taken-for-granted. It is rare to stop and consider what is cost? How is cost measured? What is measured? What is excluded?

A *What is a Cost?*

Most management accounting textbooks state that cost provides a measure of “economic sacrifice”:

⁵⁴ The thesis focuses on ‘cost’ in regulation as opposed to some other accounting measure. The NZ regime heavily relies on costing information. While revenue and other accounting measures could be valid tools for inquiry, the sheer weight placed on cost is intriguing.

Cost is the cash or cash equivalent value sacrificed for goods and services that are expected to bring a current or future benefit to the firm (Hansen & Mowen, 1994, p. 213).

At an enterprise level, cost is relatively straightforward, as markets and legal transactions tend to provide the boundaries for identifying cost. However, cost becomes more complicated in relation to products, developments, divisions, and departments: e.g. consider the cost of training a telephone operator: at one level the cost is traceable as the costs paid for providing training but at a departmental level the allocation of the training cost becomes more complex, as the operator may contribute to several products and services. In telecommunications similar examples abound, involving the costs of developing and maintaining networks, engineers, product development, software, and marketing.

1 Complexities of Cost and Telecommunications: Cost in Context

Telecommunications provides a rich environment for considering the complexities of cost, as the (economic) telecommunications costing literature illustrates (see, Ergas, 1998; Kahn, 1988; Gasmi *et al*, 2002). In particular, interdependencies, shared services, and non-market relationships create challenges regarding joint and common costs, transfer pricing, and cost allocation and apportionment. These pose difficulties to any utilities regulatory system, and specifically telecommunications due to extensive ‘cost allocations’ of joint and common costs (Bromwich & Hong, 2000; Covaleski *et al*, 2003; Major & Hopper 2005).

(a) Joint and Common Costs: Choice and Arbitrariness

Joint costs are shared costs resulting from the production of multiple products or services via common technology (such as Telecom’s PSTN). Common costs are shared costs resulting from products or services being produced jointly, but in variable proportions. Common costs often are unattributable indirect fixed costs, that are incurred in common for all services supplied by the firm and do not vary with the level

of output (Hansen & Mowen, 1994, p. 389). Ergas argues that common costs are likely to account for a substantial part of the total resources deployed in a telecommunications network (Ergas, 1998, p. 91). Joint and common costs pose challenges for calculating the profit of individual products or services. Ergas and Kahn acknowledge that joint and common costs affect regulatory pricing. Ergas notes that the exclusion of common costs from a regulatory price will distort the market, resulting in inefficient entry (Ergas, 1998, p. 105). Thus there is a degree of choice and arbitrariness in relation to the treatment of joint and common costs at the regulatory level.

(b) The Challenge of Choice of Transfer Pricing

Transfer pricing occurs when a good or service produced by one division is 'transferred' to another (Hansen & Mowen, 1994, p. 827). Telecommunications are multi-faceted businesses involving network development, retail, and wholesale services, and consequently, there is considerable transfer pricing: e.g. the development of a telecommunications service like call waiting by a residential division has potential for other business units like mobile. However, if divisions are evaluated on profitability, transfer pricing creates perverse incentives, and becomes a matter of contention, as the price charged for the intermediate product is revenue to the selling division (residential) and a cost to the purchasing division (mobile) (Ezzamel, 1995, p. 145). There are two traditional transfer price methods:⁵⁵

- 1) Traditional transaction methods test the prices of inter-division transactions by comparing similar transactions between unrelated parties. Acceptable methods include comparable uncontrolled price, cost-plus, and resale-minus; and
- 2) Transactional profit methods focus on comparing internal divisional profits with comparable independent companies with similar functions and risks. Methods include the transactional net margin method and the residual profit split method (Ezzamel, 1995, p. 148).

⁵⁵ Transfer pricing increases in complexity in cross-border organisations. For example, Telecom operates in NZ, but owns AAPT in Australia. The transfer price of goods from a parent company sold to a foreign subsidiary affects the division of the total profit across parts of the company, and may have a tax effect.

Laffont & Tirole point to the importance of controlling transaction pricing due to its potential to defeat a regulatory system (2000, p. 114). Although NZ's taxation authority (the Inland Revenue Department) 'encourages' the use of the 'arm's length' principle where associated entities charge market price to minimise the issue, the range of transfer pricing methods give scope for manipulating costs. Common transfer pricing models in telecommunications include:

- a) The service provider model where the parent company assumes all the entrepreneurial risk for the enterprise. Subsidiaries exist to provide services for the parent company. Consequently, the subsidiary has limited influence over business risks and the transfer price model reflects this;
- b) The entrepreneurial model where the subsidiary has considerable control over the risk and rewards of its business. Although the parent company retains ultimate responsibility to shareholders, the transfer price model reflects the benefits and burdens of its operational risks; and
- c) The joint venture model where the parent and subsidiary operate as partners collaborating on business operations. Thus, the transfer price model reflects the share in the burdens and benefits of its operational risks, depending on contribution.

There are complex issues concerning transfer pricing and joint and common costs that are relevant to the TSLRIC and net costing models in NZ's regulation. Below illustrates how the range of economic incentives and the degree of choice between transfer price models impacts on the arbitrariness of costs.

(c) Arbitrariness of Allocating and Apportioning Cost and the Cross-Subsidy Risk

Joint and common costs pose significant challenges to regulators, particularly through cost allocation and apportionment affecting departmental, product, line, and externally reported costs. Cost allocation techniques, include:

- a) Absorption Costing (full cost accounting): Absorption costing allocates direct costs (such as materials and labour) to products as the costs are incurred but estimates the allocation of indirect costs (fixed, overhead costs). This provides a 'full cost' of production. Absorption costing is:

A product costing method that assigns *all* manufacturing costs to a product: direct materials, direct labour, variable overhead, and fixed overhead (Hansen & Mowen, 1994, p. 911).

- b) ABC: a costing system whereby costs are assigned to the activities that drive the incurrence of cost, defined as a cost system:

that first traces costs to activities and then to products ... Activity-based costing uses both unit-based and nonunit-based cost drivers ... As a result, the ABC method produces increased product-costing accuracy (Hansen & Mowen, 1994, p. 215).

In telecommunications the allocation of joint costs can result in accounting cross-subsidies, as discussed in Chapter two. The USA Congress imposed a cross-ownership bar to prevent cross-subsidisation, enforced “accounting separation” between business segments, and strict regulation of joint cost allocation (Laffont & Tirole, 2000, p. 53). Similarly, the EU’s prescription of ABC aims to control cross-subsidies. The NZ Government does not mandate a cost allocation accounting method.

Wells criticises cost allocations because they are arbitrary and not useful “as the allocation of overhead costs is wrong in principle” and anyone who disagrees with the arbitrariness of cost allocation are confused (Wells, 1978, p. 145). Thus, technically and methodologically, cost is arbitrary. Both ABC and absorption costing are acceptable methods but with similar information the choice of allocation techniques produces different results. Equally, within a costing technique, there is considerable choice: e.g. the choice between machine hours or direct labour hours can affect the end-result in an allocation base in an absorption costing system. Thus cost involves subjective choices between methods and within methods. For telecommunications regulation this arbitrariness becomes political and makes cost a complicated concept: e.g. it is a premise of TSLRIC and net costing that the regulator knows how to run an efficient network - even better than ‘a’ dominant incumbent. The assumption that they can see and comprehend all information when making costing decisions is tenuous.

The preceding discussion illustrated the choice and arbitrariness of a complex range of technical costing issues affecting telecommunications, especially joint and

common costs, transfer pricing, and cost allocation and apportionment. The next section illustrates this complexity by reflecting on theories of cost, particularly within economics that assumes cost is a simple, objective measurement. Arbitrariness and choice within costing exists at the technical and theoretical levels with consequences at methodological, technical and political levels. Different economic presentations of cost theory involving arbitrariness and choice have interpretive and critical theory implications.

B Management Accounting Cost Theory.

The problem with ‘cost’ is that cost information is incomplete (Abdala, 2000; Bjornenak, 1997), situation-specific (Whittington, 1994), organisation-specific (Bromwich & Hong, 2000), biased (Thirlby, 1973), subjective (Buchanan, 1969), political, and constructed (Cave, 1997; Christensen & Demski, 1995; Covalleski & Dirsmith, 1988a; Covalleski & Dirsmith, 1988b; Covalleski, Dirsmith, & Samuel, 2003; Faulhaber, 1995; Ghertman & Quélin, 1995; Heald, 1996; Lucas, 2003; Major & Hopper, 2005, Hopper & Major, 2007; and Stern & Holder, 1999). The range of paradigmatic research on cost and regulation matches broader epistemological and ontological debates in the accounting discipline,⁵⁶ but particularly the management accounting literature on the inherent choice and arbitrariness of cost.

1 Arbitrariness and Choice within Economics and Cost

Economic regulatory theory employing the traditional “economic sacrifice” definition of cost denotes the interrelationship between economics and costing. In telecommunication economics, most costs are fixed relating to the setup and maintenance of infrastructure. Hence, the MC (the change in total cost resulting from producing an additional unit of output) of a telephone call is virtually zero in most

⁵⁶ See Chapter four for details of epistemological and ontological debates in accounting.

cases: only when the network is congested is it equal to the opportunity cost (the cost of the best alternative foregone) of a ‘dropped’ call. This has implications for interconnection access pricing as public interest regulatory theorists argue that access should be priced at MC (Kahn, 1988; McNamara, 1991; Scapens, Gameil & Cooper, 1983; Laffont & Tirole, 1991; and Gasmi *et al*, 2002). Technically, this peak-load pricing is considered economically efficient as:

Marginal cost includes the opportunity cost of fixed capital investment and this opportunity cost is zero during the off-peak period and reflects fixed costs during the peak period in an optimally designed system ... Marginal costs should vary according to the time of demand (McNamara, 1991, p. 96).

Below examines various economic theorisations of cost, beginning with positivism as an example of economic extremity, transaction cost economics (TCE), and agency theory.

(a) The ‘Objectivity’ of Positivism and Cost: Focusing on Production Costs to the Exclusion of Other Costs

Positivism presumes ‘costs’ are ‘universal’.⁵⁷ Cost is a concrete concept discovered independent of human interaction: it is ‘the’ measure of economic sacrifice, a universal truth.⁵⁸ Positivism focuses on the costs of production: however, treating costs as a measurable, observable phenomenon (Williamson, 1985; 1996) in an abstracted, experiment-controlled manner produces a dichotomy between practice and research (Chua, 1986, p. 607). Common areas of positivist research into cost include:

- 1) Empirical research works using observable data as a proxy for cost (Blalock, 1971; Kerlinger, 1973; Firestone & Chadwick, 1975). The focus is on generating law-like statements deduced from choices and explanatory variables.
- 2) Mathematical modelling of the implications of accounting policy choices regarding cost, in an abstracted environment to generate best-fit models

⁵⁷ See Chapter four for greater detail of the theoretical influences of positivist approaches to research.

⁵⁸ This is similar to other aspects of the accounting system, including profit, revenue, and assets. In considering the interface between law, regulation, and cost, cost is objective, factual information for the legal process. The regulator is an information processor and plays no evaluative role, and the regulator is objective, and there is no morality implicated. Regulation is the application of rules to factual evidence.

that explain and predict the results of regulatory systems (Embrechts, Furrer & Kaufmann, 2003; Oughdi, Caminada, Lamrous & Morin, 2005; Lally, 2004a; Lally, 2004b)

- 3) The implications of different costing methods on businesses, including the impact of agency cost (Whittington, 1994).

Much positivist research addresses technical accounting issues regarding GAAP and regulation alongside economics. Here research into full cost allocations and common costs is important (Cohen & Loeb, 1982; Balachandran & Ramakrishnan, 1981; Loehman & Whinston, 1971; and Zimmerman, 1979). Some literature concerns international telephony and the Accounting Rate System (Collins, 2000; de Fraja & Valbonesi, 2001; Madden & Savage, 2000; Madden & Savage, 2001; and Tang, 2001; 2003) and there is growing work on pricing policies by regulators of networked industries, particularly, the debate between ‘cost-plus’ and ‘price-minus’ pricing methodologies (see, Nwaeze, 1998; Abdel-khalik, 1988; Bowen, 1981; Bryan & Hwang, 1997; Gordon, 1974; Joskow & Schmalensee, 1986; Landon, 1990; Nwaeze, 1997; Sappington, 1980; and Teets, 1992). In particular, Nwaeze applied a cost-plus pricing model on electricity utilities in the United State finding “considerable alignment” between the market and book value of the regulated utilities (Nwaeze, 1998, p. 570).

Some economists argue that the positivist focus on the costs of production arbitrarily excludes costs associated with economic exchanges. Thus, TCE focuses on how institutions minimise the transaction costs of producing and distributing goods and services.

- (b) Arbitrariness and Choice: Why Exclude the Cost of Exchange from Cost? Transaction Cost Economics

For TCE, the cost of transaction is significant. Coase argued that there are costs of using the ‘price mechanism’ with consequences for whether firms or markets will

perform particular functions (1937, p. 386). Williamson popularised the term, TCE, by extending the economic focus on demand and supply to consider a broader range of transactions and the costs of institutions (Williamson, 1996). In short, production costs only illustrate part of the costs facing a firm. TCE agrees that organisations' seek cost minimisation but sees a firm's total cost as a combination of production and transaction costs. Production costs tend to be easy to define and measure compared to transaction costs, which represent the costs of coordination. Williamson notes that transaction costs include:

... *ex ante* economic costs of: (1) search and information cost, (2) drafting, bargaining, and decision costs, and (3) costs of safeguarding an agreement. *Ex post* economic costs include: (1) costs of measuring input, (2) costs of measuring output, (3) monitoring and enforcement costs, and (4) adaptation and haggling costs (Williamson, 1985, quoted in Lajili & Mahoney, 2006, pp. 574-575).

TCE holds that organisational choice and form is a critical component in the total economic cost of an organisation. Thus, TCE provides theoretical insight into the role of demand, technological uncertainty, and physical, human, and site asset specificity (Williamson, 1985; Krickx, 1995):

The fundamental idea is that contractual difficulties can be anticipated when opportunistic agents engage in frequent transactions in an environment of sufficient (demand and/or technological) uncertainty to surpass bounded rationality capabilities. The contractual risk of some opportunistic agents utilising asymmetric information to their advantage ... is high ... (Lajili & Mahoney, 2006, p. 575).

TCE incorporates issues of markets, organisational structure, bureaucracy, and trust. It is relevant to telecommunications, particularly in relation to network development, interconnection, and technological innovation: e.g. as networks grow the complexity of the software that runs them increases. Increased software needs require purchasing more software licenses but these transaction costs are often excluded. Equally, implementing new technology is assumed to reduce an organisation's costs but Cordella and Simon argue that the transaction costs may increase as the amount of information processed by an organisation increases (1997; Cordella, 2001; 2006).

Thus TCE illustrates how traditional economic costing has a limited perspective on the costs confronting an organisation. However, TCE is criticised for excluding the measurement uncertainty that affects the choice of organisational form (Barzel, 1982; Eisenhardt, 1985). In contrast, agency theory emphasises information asymmetry, manipulation, and divergent interests in cost measurement.

(c) Arbitrariness and Choice: The Costs of Information Asymmetry and Divergent Interests

Work on the principal-agent model and costs emphasises how measurement uncertainty influences organisational form (Jensen & Meckling, 1976) and the role of information asymmetry (Lajili and Mahoney, 2006, p. 575). Agency theory criticises traditional economics and TCE for assuming that information in markets is perfectly symmetrical and it argues that the degree of uncertainty and information asymmetry in transactions is an important cost component (Eisenhardt, 1985).⁵⁹

Accounting research using agency theory tends to focus on information asymmetry and supplementary financial accounting disclosures (Whittington, 1994) or management accounting systems, namely ABC (Bromwich & Hong, 1999; Bromwich & Hong, 2000). Whittington examines the use of current cost accounting [CCA] in the UK to regulate utilities. In the early 1980s, UK companies could voluntarily produce CCA (under SSAP 16) but only regulated utility companies (including British Gas, regional electricity companies, water companies, and the British Airports Authority) produced CCA reports. The Byatt Report, 1986, recommended CCA as appropriate for State-owned enterprise regulation as the ‘current cost’ “represented the cost that would be faced by a hypothetical new entrant to the industry”.

⁵⁹ In the incorporation of TSLRIC for interconnection and net costing for the KSO, this is recognition of the agency theory problem of information asymmetry and bias. In particular, by regulating TSLRIC and net costing, elements of bias are arguably removed. More importantly, to counter-balance aspects of the information asymmetry problem, the regulation, the Telecommunications Commissioner, has the power to make the final determination with respect to costing information.

[C]urrent cost operating profit represented the surplus the such an entrant could earn from operations and current cost of the assets employed represented the costs of creating the business in a competitive market (Whittington, 1994, p. 89).

Whittington attributes the continued use of CCA by regulated utilities to regulatory insistence on price-cap rather than rate-of-return regulation. In the ‘judgemental process’ of price-cap regulation, rate-of-return regulation is merely one of several factors considered by regulators – others allow for innovation and efficiency improvements (Whittington, 1994, p. 90). Whittington concludes that CCA suits a price-cap regulatory model as it appropriately accounts for rate of return without being ‘overwhelmed’ by allowable returns to investors (Whittington, 1994, pp. 99-100). In short, Whittington argues that CCA represents how regulated utilities can calculate their inherent rates of return to counter-balance the information asymmetry of the regulation process.

Bromwich and Hong (2000) examine OFTEL’s insistence upon ABC and accounting separation of British Telecom [BT]. They attribute BT’s comprehensive complex hierarchical current costing system (informed by ABC) to accounting separation (attributing fully articulated costs to network components). In short:

the essential objective of this system is to use accounting to separate those components of the network which are regulated from those deemed to be competitive or potentially competitive (Bromwich & Hong, 2000, p. 161).

Under BT’s “Long Run Incremental Cost Methodology [LRIC]”, fully allocated costs are assigned to cost pools to derive LRIC and short run average cost. In “a compromise between practice and theory”, BT’s model does not accord with accepted incremental cost theory, as it is not based on a fully optimised network and it makes little allowance for technical change. Consequently, Bromwich and Hong raise serious accounting concerns surrounding BT’s model. This includes the treatment of non-separable costs and joint costs of network components, which results in single cost drivers distorting costs of a cost pool. This notes the difficulties of implementing ABC in complex

networked industries: although BT's system was a 'good practical attempt' its many problems "reduce the integrity of the costs produced" (Bromwich & Hong, 2000, p. 178). This ABC example demonstrates how choice and arbitrariness affect costs produced and presented.

These three examples of economic approaches to cost (positivism, TCE, and agency theory) illustrate the degree of choice and arbitrariness within the economic measurement of cost. The positivist focus on the costs of production leads to TCE challenging the arbitrary exclusion of the costs of exchange, whereas agency theory proponents accuse TCE of excluding the costs of information asymmetry and divergent interests. However, all these economic approaches seek the absolute true presentation of cost. Scapens challenges this notion of absolute truth, and traces the shift from production costing to a conditional model. The next section considers Scapens' critique to establish a framework to consider costing from an interpretivist and critical perspective.

C Conventional Management Accounting Cost Theory: A Critique of the Economic Approaches to Cost: "Different Costs for Different Purposes"

Scapens examines the changing 'conventional wisdom' of management accounting (1985, p. 8). Prior to World War Two the focus was on 'cost accounting' and determining costs, "with particular emphasis on product costing and the control of direct labour, direct materials and overheads" (Scapens, 1985, p. 9). 'Full' cost was the predominant aim and cost accounting focused on methods of cost identification, allocation, and absorption.

Clarke's 1923 economic study of cost identified "great opportunities for ... arbitrary and fictitious notions of cost, through the 'necessity' of apportioning items, "even if there was no scientific basis on which to do it" (1980, p. 268). Clarke stated:

If cost accounting sets out, determined to discover what the cost of everything is and convinced in advance that there is one figure which can be found and which will furnish exactly the information that is desired for every possible purpose, it will necessarily fail, because there is no such figure. If it finds a figure which is right for some purposes it must necessarily be wrong for others (Clarke, 1980, p. 268).

Vatter reinforced this:

There is no one cost which will fit all purposes any more than there is a single wheel which will fit watches, motor trucks, and railway trains ... [a cost accountant] must be able and willing to secure the kind of data which management may require for the many and varied purposes cost data may serve. He must determine how total costs behave at various levels of production for the product. He must be able to determine differential costs where the situation demands their use ... The mere grinding out of figures according to a stereotyped plan is not cost accounting and should not be referred to as such (Vatter, 1980, p. 268-269).

Following World War Two the focus shifted to rendering “cost information, in particular, and accounting information, in general ... appropriate to the needs of users” (Scapens, 1985, p. 9). Horngren distinguishes between the ‘era’ of cost accounting and the ‘era’ of management accounting:

In an exaggerated sense, the cost accountants main mission might have been depicted as the pursuit of *absolute truth*, where truth was defined in terms of getting as accurate or precise costs as possible ... [While in management accounting] the theme of ‘different costs for different purposes’ was stressed – a preoccupation with finding *conditional truth* (Horngren, 1975, 9-10). [Emphasis added]

For Scapens the move to the ‘conditional truth’ model in management accounting implies that different costs are needed for different purposes; that accounting information depends on the information needs of users. Then:

once the decision model is postulated the conditional truth approach implies that the appropriate information can be determined by deductive reasoning, i.e., truth can be attained (Scapens, 1985, p. 22).

Scapens’ thesis is that the more economically sound (theoretically) the concept of cost becomes, the more subjective it is. Here it is important to clarify what is the ‘cost’ concept under scrutiny. The NZ regulator is tasked with determining relevant costs but within this there is a distinction between cost as an accounting tool and an economic device. In accounting, historical or embedded costs modified by depreciation charges measure consumption. Economic theory argues that pricing based on historical costs

fails to match economic costs and prices leading to inefficient resource allocation. Hence regulators look to forward-looking economic theory to give industry participants efficient signals for entry, investment and innovation. Economic cost is about *opportunity cost*. Atkinson *et al* argues that firms make decisions based on prices and forward-looking economic costs in dynamic industries like telecommunications (1997).

Theoretically:

forward-looking economic costs are the costs which would be incurred if a new service were to be provided (with the least-cost, most efficient technology currently available), or avoided if an existing service's provision were to be terminated, assuming that *all* inputs of the firm can vary freely (thus the term 'forward-looking' or 'long-run'). Considering the long-run economic cost ensures that the firm recovers all of its costs, not only operating and maintenance costs (which vary in the short run), but also fixed investments costs, necessary inputs in the provision of the service (which are not variable in the short run) (Benitz *et al*, 2002, p. 23).

From a theoretical regulatory perspective, it is accepted that forward-looking long-run incremental costing is the interconnection pricing rule; paradoxically, there is little consensus amongst economic theorists, regulators, and industry participants as to how to measure costs.⁶⁰ The issue of subjectivity arises due to necessary assumptions on how to measure costs involving opportunity cost, the cost of capital, and the net present value of future returns. Moreover, as Scapens argues, the more economically sound the cost, the greater the subjectivity.

The conditional truth model does not include the cost of information provision and the uncertainty in practical decision-making. Demski and Feltham, recognise the critique of 'conditional truth':

First, truth – even if desirable – cannot be obtained without incurring a cost. Measurement consumes resources ... Second, users operate in an uncertain world and explicit recognition of uncertainty casts doubt on the concept of a true cost, which implicitly presumes a certain world ... Third, the concept of a true cost (whether conditional or absolute) is likely to be both illusory and irrelevant in a multiperson world (Demski & Feltham, 1976, pp. 7-8).

⁶⁰ As an example, the US Federal Communications Commission [FCC] is required to apply forward-looking economic cost methodologies to determine the universal service cost. In their analysis, the FCC concluded that the Cost Proxy Model, the Benchmark Cost Model 2, and Hatfield Model all displayed tremendous promise as a regulatory model. In consultation, though, the FCC developed and adopted its own model, known as Hybrid Cost Proxy Model. As can be seen, there is tremendous scope for dispute at the methodological level, surrounding measurement of cost.

An unavoidable question all researchers face is how to interrogate and make sense of social phenomena like cost, which involves understanding their construction and their political consequences. Cost theory recognises the social constructionist aspects of cost, costing, and cost measurement, under the maxim, ‘different costs for different purposes’ (Scapens, 1985). However, cost is still referred to as a measure of “economic sacrifice”, as though objectively real (see the economic discussion above). A key tension within accounting and cost remains a quest for objectivity. Cost as a concept exists – things do cost - the point is that in the theory of cost there are different costs for different purposes. The accountant’s notions of cost and their techniques for representing cost questions whether ‘true cost’ representations exist. Thus, the representation presented by the accountant is always partial (Morgan, 1988): e.g. at a simple level, accounting fails to incorporate all costs into its systems – externalities like pollution are traditionally excluded. This reinforces the argument that accounting is socially and political constructed, and accountants and accounting actively construct reality (Morgan, 1988, pp. 482-483).

1 Legal Recognition of the Conditional Truth Thesis: ‘Different Costs for Different Purposes’ and Telecommunications Law

There has been limited acknowledgement of the conditional nature of accounting information by the judiciary. The Supreme Court in *US (Federal Communications Commission [FCC]) v Chesapeake and Potomac Telephone Company of Virginia* [1996] 516 US 415 affirmed the decision of the Fourth Circuit Court of Appeals concerning the FCC’s attempts to prevent cross-subsidisation:

Whether or not it would be possible to prevent cross-subsidization through such rules, if the FCC were given adequate resources to monitor [local exchange carriers] effectively, that approach does have significant disadvantages, such that Congress could reasonably choose a cross-ownership bar instead. The regulatory task of containing cross-subsidization through accounting rules is decidedly complex. The inherent subjectivity of cost accounting issues that would have to be addressed under a regulatory approach, the ongoing possibility of evasion of, and litigation over, accounting rules set by the FCC, and the need for substantial auditing resources sufficient to prevent evasion all support Congress’s choice of a simpler approach to the problem of unfair cost-shifting (p. 418).

The Supreme Court acknowledged the inherent subjectivity of cost accounting, reinforcing the 'conditional truth' of the accounting process. However, law seemingly ignores these subjectivities within 'cost': the Supreme Court acknowledges the 'conditional' nature of accounting challenges the legal process. In fact, this may refute Napier and Noke's claim that accounting is subordinate to the law: law may be subordinate to accounting due to the limitations of the legal process (Napier & Noke, 1992, pp. 31-32).

Law rarely recognises the inexact nature of 'cost', and with the complexity of telecommunications, this poses significant challenges for the legal process. Urbanski comments on the USA experience:

Let us start at the end. You are in a court of law sitting next to your lawyer, and there they are – the jury. They are a box of strangers who hold your company's future or your life in their hands. What are they likely to think about antitrust and corporate America? First, given the background of most jurors, they are going to be overwhelmed by any of the stuff we have heard today because I am too. They are going to be overwhelmed by the economic, industrial, and policy issues presented to them. They are, in short, likely to have some sort of bewildered glaze over their eyes that each of us had when we first read the Telecommunications Act 1996.

One juror, interviewed after listening to an antitrust case, put it this way: 'I thought I just got off the plane in Tokyo. Everything looked and sounded Japanese. I was totally lost'. Again, the analogy to the 1996 Telecommunications Act is wholly appropriate. Jurors in antitrust cases ... will focus on what they think is important, not what is important to your business, or what may be significant, or even relevant, in legal terms (Urbanski, 1996, paras 25-26).

The interface of law and accounting in telecommunications regulation provides a challenging environment for accountants, lawyers and regulators. It combines the complexities of:

- a) Costing, characterised by choice, arbitrariness, and conditionality at methodological, technical, and political levels;
- b) The legal process characterised by the necessity of processing information from various sources, where that information is often conflictual; and
- c) Regulation, particularly regarding the range of stakeholders and political interests, and the difficulty of determining its focus.

So, why consider the interface of law and accounting? Law and accounting are not objectively real, as both are subjective, socially constructed institutions. Thus, their interface is a construction and is an arena for the clash of two constructions. Further, neither law or accounting exist in a vacuum; they do not exist independent of society but incorporate, rely upon, use, adopt, act, and require society (Lloyd, 1983; Morgan, 1988). Thus, a theoretical approach recognising the socially constructed nature of cost and regulation is required. The next section considers the interpretivist (choice) and critical theory (power and meaning) implications on cost.

D Cost and Interpretivism and Critical Theory: Recognising the Socially Constructed Nature of Cost

Interpretivist theory recognises the socially constructed nature of cost, and how 'regulation' and 'cost' become local and particular. Its focus is on the construction of cost, and the meanings, rituals, and symbols associated with costing. The researcher recognises that 'truth' is constructed, and a claim relevant to one social group may not be relevant to others. Thus, accounting and cost are cultural practices, and 'cost' and 'costing' are contingent upon human practice and interaction. As Crotty argues there are no absolute or valid interpretations of cost, but conditional, cultural, and local interpretations that are 'useful', 'liberating', 'fulfilling', or 'rewarding' (1998, pp. 47-48). Interpretivist management accounting research considers the systems and rituals surrounding the production of costing information, as in budgeting, or on behaviour that flows from accounting information and accounting decisions.

Critical theory recognises the inter-subjective objectivity of cost but argues that historical and material conditions prevent people recognising this and playing an active role in constructing meanings attributed to cost. The critical theorist does not take the existing affairs for granted but makes judgments and seeks change. Central to this is a belief that 'cost' and 'costing' are powerful and political:

Accounting practice is no longer seen as a neutral, benign technology reporting the facts of organizational life. Rather accounting practice is interested, problematic, and shapes the context in which it operates (Ross, 1995, p. 151).

Thus, cost is seen as a tool for maintaining power relationships within society; the discourse of costing creates and sanctions conceptions of 'truth' to the detriment of some sectors in society; and it dehumanises human beings and society by reducing social relations to measurable entities - if it cannot be counted it is excluded. Thus critical theory argues that:

[a]ccounting [and therefore, costing] has been created and developed to accomplish various desired objectives and, therefore, it is not based on fundamental laws or absolute precepts (Catlett, 1960, p. 44).

In a management accounting context, Puxty continues:

Management accounting is a set of social practices that delineate the space within which the activity of the workforce might be made visible and susceptible to rational calculation ... [It] is an instrument within an enterprise that facilitates the exploitation of, and extraction of surplus value from, its employees by the capitalist interests that, through management control the accounting system (Puxty, 1993, 4).

1 Interpretive and Critical Theory Research into Cost and Regulation

(a) The Challenge of Creative Accounting

McBarnett and Whelan argue that the greatest challenge facing regulators is 'creative accounting', defined broadly as including acts of direct fraud and flagrant breaches of accounting standards (McBarnet & Whelan, 1991; Hawkins, 1994; McBarnet & Whelan, 1994; 1999a; 1999b; McBarnet, 2006). However, they point to more subtle attempts by regulated entities 'playing the system', 'subverting' and passively resisting regulatory systems, including calling the regulator's bluff by taking litigation to exhaust under-funded regulatory budgets. 'Creative accounting' is often difficult to identify. Law is inherently subjective: 'creativity can still be perfectly legal', as loopholes exist. McBarnet and Whelan argue that in seven years of investigations (1989-1996) by the UK's Financial Reporting Review Panel, no case went to court. This queries the apparent 'might of the law' (McBarnet & Whelan, 1999a, pp. 69-76;

Baxt, 1970; Chandler & Edwards, 1994; Walker, 1996; Napier, 1998; Ardern & Aiken, 2005).

(b) The Failure of Regulatory Communication

Regulatory conversations mark the discursive space “where communicative interactions that occur between all involved in the regulatory” process occur (Black, 2002a, p. 163). Black argues that they may reveal power struggles over interpreting and implementing regulation, and close attention to discourses may reveal “significant interdependencies, power dispersal, and fragmentation” (2002a, p 194). Regulatory conversations pose a significant challenge to regulators (Black, 2002a, pp. 170-171). Regulatory communication within command and control-type regulation increases the likelihood of instrument, information, knowledge and implementation failure, and regulatory capture due to the regulatee providing the information to the regulator (Black, 2002a, pp. 2-3). The TA, particularly, requires considerable regulatory conversation surrounding cost. The TA prescribes TSLRIC interconnection pricing but provides little detail on how TSLRIC should be implemented. As Major and Hopper comment in relation to ABC, there is no such thing as TSLRIC, until the formation of a model and the subsequent input of costing information (2005). Thus, the TSLRIC model requires significant conversation at methodological, technical, and political levels between the regulator and regulatees ranging from education, construction, development, running and results. In relation to TSO, similar regulatory conversations are necessary in relation to the ‘net costing’ model proscribed by Government, as the Act provides little on the mechanisms necessary to construct, develop, and run a ‘net costing’ model. Furthermore, at a technical and political level, Telecom ‘must’ provide much of the information that forms the basis of the regulator’s determinations. Furthermore, despite the practice of legislating for ABC as a specific cost allocation model in the UK and Europe, the NZ Government chose not to regulate a cost allocation

system (Major & Hopper, 2005). Thus, there is scope for regulatory game-playing and dispute between industry players.

The extent of disagreement among regulatees over the regulator's net cost calculation of the TSO under the TA is a useful illustration. Most industry participants monitored the development and application of the 'net costing' model used by the Commissioner to apportion amounts to liable persons (industry participants who interconnect with Telecom's PSTN). In developing the model, the TA required extensive consultation with interested participants, involving submission and counter-submission. Industry participants submitted extensive technical costing information to inform the CC's draft TSO determination, and challenged the CC's draft determination with further submissions and counter-submissions (at methodological, technical, and political levels). However, after intensive consultation, industry participants still disagreed with the final determination of the 'net cost' of satisfying the TSO. A brief survey of the 2001-2002 and 2002-2003 determinations illustrates the difference between regulatees' estimates and the Commissioner's estimates of net cost of TSO provision:

- 1) 2001-2002: Telecom submitted that TSO net cost was \$425 million. Following complaints by industry players about the method of calculation, the Commissioner reconstituted the formula. Telecom subsequently revised the TSO cost figure to \$408 million per annum. TelstraClear submitted that the TSO net cost was \$214 million. The Commissioner determined that the annual net cost of the TSO was \$73.4 million.
- 2) 2002-2003: Telecom submitted that the TSO net cost was \$215.5 million. The CC disagreed, determining a \$56.8 million annual net cost for the TSO.

There is considerable disparity between these figures: while it is in Telecom's competitive and financial advantage to inflate the cost of TSO provision, there is still a major gap between Telecom's estimates and the Commissioner's final figure.

Furthermore, TelstraClear continues to contest the model: it annually submits that in calculating the net cost of the TSO, the CC should consider:

- a) The profits Telecom generates from commercially viable customers under the TSO;
- b) Monopoly rents that Telecom extracts by way of TSO cost recovery; and
- c) The competition impact of the TSO and the TSO funding mechanisms.

This illustrates the need for communication between parties concerning cost accounting information at the methodological, technical, and political levels. Equally, it demonstrates the command and control nature of NZ's regulatory model, and the scope for regulatory capture due to the regulator requiring information from the regulated. It also highlights the discursivity of the regulatory environment based around adversary. Black's call for increased discourse analysis of regulation shifts analysis from the institutional process (2002a, p. 195), seeing political regulatory theory as overly process oriented (Horwitz, 1989). For Black, discourse analysis may be fruitful as it combines the discursiveness of regulation with social science (2002a, p. 196).

- (c) The Dichotomy of the Constructed Nature of Cost and Fact: Uncertainty and Subjectivity

The critical examination of the interface of law and accounting examines the relationship between facts and cost. The day-to-day practice of law (legal positivism) treats accounting as 'fact' (Hadden & Boyd, 1992, pp. 57-58; Napier & Noke, 1992, p. 36). The limits of the techniques of accounting render it impossible to represent 'true cost', for such a representation does not exist (Poovey, 1998, p. 281):

'Facts' are no longer facts when alternative interpretations are possible; nor do they have the same 'factual' quality when what is being measured or described is not susceptible to precision. 'Facts', so regarded, become the pabulum of discussion, of argument, or of negotiation. Communication of 'facts' is no longer merely a process, but the imperfect representation of a situation, an essay in persuasion or an act of outright propaganda. The scope for complete objectivity is rare (Hussey & Marsh, 1983, p. 154).

A lack of 'factuality' and 'objectivity' are not unique to cost and accounting, but the fundamental question revolves around the descriptive noun of 'fact', which invokes certain notions of truth, objectivity, and correctness. Financial information can produce various accounting answers due to the indeterminacy of language (Wittgenstein, 1974),⁶¹ and the role of accountants to work around 'rules' (Napier & Noke, 1992). Thus, this is a tension underpinning the logic of cost: the quest for objectivity vis-à-vis the presentation of a partial and one-sided representation:

Accountants often see themselves as engaged in an objective, value-free, technical enterprise, representing reality 'as is'. But in fact, they are subjective "constructors of reality": presenting and representing the situations in limited and one-sided ways. They are not just technicians practising a technical craft. They are part of a much broader process of reality construction, producing partial and rather one-sided views of reality, exactly as an artist is obliged to produce a partial view of the reality he or she wishes to represent (Morgan, 1988, p. 477).

Morgan argues that accountants and accounting are "constructors of reality" with the tools of accounting enable competing 'factual' 'pictures'. Broadbent comments on 'our desire' for accountability:

In order to make ourselves accountable and ensure due governance, we seek (or are forced) to render our actions transparent. The use of accounting in both its programmatic and its technological sense is associated with this; alongside this is the extensive use of auditing. The deep irony is that the tools that are used are themselves not necessarily open and transparent (Broadbent, 2002, p. 445).

The lack of openness and transparency within cost accounting challenges telecommunications regulation. To the uninitiated, the designation of 'cost' seems simple and free from judgment but from a practical perspective it is difficult and unique for each firm. Scapens noted the inherent conditionality of management accounting in relation to cost, as 'different costs are needed for different purposes' (Scapens, 1985, p. 22). Cost is inherently subjective; the public manifestation of various choices within and outside the organisation, reflecting an array of discursive influences including the political environment, shareholders, stakeholders, management, and the preparing

⁶¹ Baxter and Chua's review of management accounting emphasises the critique of the real, "problematizing the constitution of 'reality' by characterising it as a product of ongoing or interpretive acts" (Baxter and Chua, 2003, p. 100).

accountant(s). All influence 'cost'. The subjective, constructed nature of cost is a recognised accounting and regulatory concern (Pasour Jr., 2004; Thirlby, 1973; Buchanan, 1969).⁶² Pasour Jr. depicts the problems of regulation on a largely 'cost-plus' model:

Information problems also prevent regulators from regulating effectively. These information problems are rooted in the separation of knowledge and power. That is, individuals with decision-making power in the political process do not have and cannot obtain the specialized information about demand and supply conditions known by producers, consumers, and resource owners ... Thus, attempts to set prices on the basis of costs are futile because regulators cannot determine the costs that influence entrepreneurial choice.

... Cost and revenue calculations and entrepreneurial actions ultimately hinge on subjective opinion. Furthermore, in cases in which utility commissions attempt to regulate prices, it is likely to be a matter of differences of opinion. Since entrepreneurial cost and revenue calculations are based on unique knowledge and attitudes toward risk, the validity of over-riding such calculations by the regulator is 'dubious in the extreme' (Pasour Jr, 2004).

Consequently, the inherent uncertainty and subjectivity of costing poses a serious challenge to regulatory systems requiring cost information. Essentially, cost information is incomplete, situation-specific, organisation-specific, biased, subjective, political, and constructed (e.g., Bjornenak, 1997; Lucas, 2003; Faulhaber, 1995; Christensen & Demski, 1995; Stern & Holder, 1999; Abdala, 2000; Ghertman & Quélin, 1995; Cave, 1997; Heald, 1996).

(d) Regulation and Costing: Political Subjectivity, and the Social and Institutional Creation of Meanings of Cost.

Regarding the interface of regulation and cost, Covalleski *et al* consider the implications of TCE for the de-regulation of utility industries in California and associated management control issues (2003). They argue that accounting information as a regulatory tool has become increasingly important for identifying anti-competitive behaviour or market structures that affect competition (including monopoly, duopoly, and oligopoly behaviour) (Covalleski *et al* 2003; Covalleski & Dirsmith, 1988a; 1988b).

⁶² Buchanan's work challenges traditional cost theory and points to economists such as Wicksteed, Jevons, Davenport, Knight, Robbins, Hayek, Mises (who developed with Hayek, 'subjectivist economics'), and Thirlby as responsible for continuing to develop the subjectivity of cost theory.

In noting the increasing use of accounting for determining regulatory prices, especially in relation to TSLRIC pricing, they note the difficulties associated with ‘cost’ in telecommunications, due to the presence of substantial joint and common costs.⁶³

Covaleski *et al* argue that:

The question arises, however, as to the efficiencies of accounting information serving *efficiency seeking* versus *legitimacy seeking* purposes in contentious, politically fragmented contexts. As asset specificity increases and the possibility of opportunism in strategic transactions becomes heightened - thus exacerbating an already contentious context - the instrumental, efficiency seeking role of accounting takes on less significance. Commons recognised that his “pecuniary calculus of accounting” did not provide optimal, instrumentally efficient solutions but perhaps put government in the role of playing a “private nurse” for corporate agents. But this “pecuniary calculus of accounting” did, as Merino (1993) observed, serve as a system of rationalisation for the ongoing system of economic power embedded in oligopolistic markets of his and indeed our time. The desire to avoid the more extreme consequences of high asset specificity in utility contracts, such as the divestiture of electric utilities and consequential dramatically increased state involvement in the industry, provided an arena within which accounting could play a much more variegated role than merely generating instrumental efficiency solutions to technical problems (Covaleski *et al*, 2003, pp. 438-439).

Covaleski *et al* critique the effects of TCE, demonstrating the limits of positivist approaches to costing and regulation of Californian utilities, and point out that they neglect fundamental issues of subjectivity, politics, consensus, and the social and institutional creation of meanings of cost.

Major and Hopper explore implementation of ABC at Marconi, a Portuguese telecommunications company (2005). Their case study provides insight into technical issues concerning ABC, as well as organisational and labour implications. The study differs to Bromwich and Hong as it focuses on the implementation of ABC, rather than whether it generates accurate interconnection prices. Major and Hopper (2007) note the challenge of joint and common costs in telecommunications, and the failure of ABC to adequately cope with this issue. The paper provides insights into employee reactions to ABC during and after implementation. Most groups involved with regulation considered ABC implementation to be successful and favourable but there was employee resistance, scepticism from production managers and increasingly

⁶³ Major & Hopper (2005) note that Bromwich and Hong (2000) mirror this point.

accountants, which affected the veracity of the ABC calculations due to “late and inaccurate allocations of times to activities”. There are a series of lessons: first, within an institution, a lack of goal congruence, training and support, as well as hostility towards ABC, particularly by production managers, seriously impacted the cost calculation; second, the high degree of common costs within telecommunications may result in unreliable and subjective ABC cost calculations; and finally, that internal resistance can derail the implementation of ABC. Given that the EU mandates the provision of cost information based on ABC, the Marconi experience with ABC and subsequent lessons challenge this regulatory approach. It is supposed to reduce the scope for subjectivity, disagreement, and the cost of compliance of information provision. Major and Hopper’s analysis indicates that it may fail each of these regulatory goals, due in part to the social and institutional creation of the meaning of cost.

In short, Covaleski *et al* and Major and Hopper acknowledge the social and institutional creation of the meaning of cost, which are organisation, situation, and politically specific. Cost and costing methodologies introduce technical, methodological, and political choice and subjectivities that challenge the regulatory process, if not defeating the regulatory process altogether.

VI CONCLUSION

Accounting and ‘cost’ assumed centrality within the TA 2001. This chapter traced the centrality of the interface between law and cost depicting the emergence of TSLRIC interconnection and net costing of the TSO through the political process. The chapter then problematised the interface of law and accounting by considering the theory of cost and detailing the methodological, technical, political shifts from cost as technical to political. The key conclusions are:

- Law and accounting are intertwined, as the two disciplines increasingly come closer together. Law provides a framework for the day-to-day practice of accounting and influences its scope. Accounting is a common source of information in legal disputes and a powerful media of expression.
- The TA requires substantial accounting information, particularly TSLRIC interconnection access and the net costing model of the TSO. 'Cost', assumed a central position within the regulatory framework.
- During the MIT and subsequent Government consideration, TSLRIC and the net costing models signified answers to the need for a competitive interconnection access regime and provided a regulatory approach to the KSO. It demonstrated the role of cost at methodological, technical, and political levels.
- Telecommunications provides a rich environment for considering the complexities of cost. In particular, interdependencies, shared services, and non-market relationships in telecommunications creates challenges in relation to joint and common costs, transfer pricing, and cost allocation and apportionment. These pose difficulties to any regulatory system.
- Cost traditionally is a measure of economic sacrifice but there are elements of inherent choice and arbitrariness to cost: e.g. positivist economic approaches focus on the costs of production; transaction cost economics argues that this focus excludes costs associated with economic exchanges; and agency theorists emphasise that transaction cost economics undervalues the role of measurement uncertainty in influencing organisational form.
- Scapens' critical review of cost and economics challenges the notion of absolute truth in cost, and recognises the shift from production costing to a conditional model of costing based on the maxim of 'different costs for different purposes'.
- Interpretive and critical theory recognises the socially constructed nature of cost. The focus of interpretivist research is on the construction of cost, and associated meanings, rituals, and symbols, while the critical theory research focuses on cost as power and politics.
- Interpretive and critical theory research illustrates the challenge of:
 - o 'Creative accounting' for regulators in identifying creativity.
 - o Regulatory conversations and communication between parties over cost accounting information at methodological, technical, and political levels.
 - o Cost posing as 'fact' by the possibility of alternative interpretations at methodological, technical, and political levels. The inherent uncertainty and subjectivity in costing poses a serious challenge to regulatory systems.

- That with respect to costing and regulation, there are fundamental issues of subjectivity, politics, consensus, conflict, and the social and institutional creation of meanings of cost.

Chapters two and three introduced the constituent elements of this thesis encompassing the disciplines of accounting, law, regulation, economics, and politics. This chapter argues that telecommunications regulatory regimes assume a simplistic, positivistic notion of cost. The NZ regulatory regime attempted to deal with bias and information asymmetry by prescribing TSLRIC and net costing as specific costing methods, and by giving the regulator the final decision. Thus, the regulatory regime recognised some of the agency theory problem but failed to deal with the core issue of establishing cost. For accountants, the establishment of cost is complex, and includes issues of arbitrariness, choice, contestability, social and institutional constructionism, politics, and subjectivity. Consequently, the thesis examines the interface of law and accounting by problematising how cost shifts from the technical to the political in telecommunications regulation. Thus, Chapter four reflects on paradigmatic research within law and accounting by comparing and contrasting positivism, interpretivism, and critical theory and whether they provide sufficient scope of inquiry to examine the issues identified in Chapters two and three. Chapter four suggests that current paradigmatic approaches are unsatisfactory and that a post-structural approach is more appropriate to examine the interface of law and accounting and the use of cost in regulating NZ telecommunications.

- Chapter Four -

Paradigmatic Research in Law and Accounting

The history of thought and culture is, as Hegel showed with great brilliance, a changing pattern of great liberating ideas which inevitably turn into suffocating straightjackets, and so stimulate their own destruction by new emancipatory, and at the same time, enslaving conceptions. The first step to understanding of men is the bringing to consciousness of the model or models that dominate and penetrate their thought and action. Like all attempts to make men aware of the categories in which they think, it is a difficult and sometimes painful activity, likely to produce disquieting results (Chua, 1986, p. 601).

I CHAPTER FOUR OVERVIEW

Chapter three demonstrated the scope of the interface of law and accounting, illustrating the centrality of cost to telecommunications regulation. The problematising of positivist assumptions about costs demonstrated marked contestability at methodological, technical, and political levels. The arbitrariness and inherent choice within costing is reflected partly in different economic theorisations of cost, including positivism, TCE, and agency theory. According to Scapens the more theoretically correct the economic cost is, the more subjective the measure becomes. Scapens' critique introduced a conditional costing model, based on the maxim 'different costs for different purposes'. As Scapens introduction of subjectivity is rooted in a critique of economics, this was extended to embrace interpretive and critical theory's recognition of socially constructed costs. Thus, costs are not merely technical but political, and involve subjectivity, politics, consensus, conflict, and the social and institutional creation of meanings. This range of theoretical and practical 'cost' critiques poses significant challenges for regulation and research, because cost methodologically, technically, and politically invokes multiple epistemologies and ontologies. Consequently, to interrogate the interface of cost accounting and telecommunications regulation it is necessary to justify an appropriate theoretical research framework. Chapter four addresses two questions:

- 1) Can positivism, interpretivism, or critical theory sufficiently analyse the issues identified in Chapters two and three, including telecommunications

re-regulation, limitations of economic theories of regulation, the growing interface of law and accounting, and the problems of cost becoming a core regulatory component? This requires examining parallel research traditions in accounting and law, limitations of current paradigmatic approaches, and whether positivism, interpretivism, or critical theory are epistemologically and ontologically commensurate with the cost critiques.

- 2) Why is a post-structuralist form of inquiry more suitable? This requires clarification of what is meant by post-structuralism; how this relates to accounting, law, and regulation; and whether post-structuralism is ontologically commensurate with the cost critiques?

The chapter examines paradigmatic approaches to law, accounting, and regulation, especially positivism, interpretivism, critical theory, and post-structuralism, to assess their suitability for the focusing questions of the thesis. Within each discipline theoretical disputes are widespread: within accounting there is debate between prescriptivism and descriptivism (Deegan, 2006, p. 5); in law, jurisprudence embodies a debate over law's role as "... one of the great civilising forces in society" (Lloyd, 1983, p. iv). This chapter argues that a post-structuralist informed theoretical framework provides the most suitable research platform for examining the complex interdisciplinary issues under scrutiny.⁶⁴

The first section argues that positivism, despite being the dominant research paradigm in law and accounting, is unsuitable as it promotes assumptions that objects are separate from subjects and research can be value-free.⁶⁵ In contrast, the section argues that political processes of accounting, law, regulation, and cost depend on human agents, and consequently holding subjects and objects as separate is epistemologically and ontologically unsound.

⁶⁴ Chapter five introduces Laclau and Mouffe's DT.

⁶⁵ The discussion of positivism and cost in Chapter three presented much of the underlying epistemology and ontology.

II WHY POSITIVISM IN LAW AND ACCOUNTING IS AN INAPPROPRIATE PARADIGM

The dominant research paradigm within both law and accounting is positivism.⁶⁶ Each discipline incorporates positive theory similarly (Chua, 1986; Davies, 2002).⁶⁷ Positivist accounting theory [PAT] is related to contractarianism in law theoretically and methodologically (compare Watts & Zimmerman's PAT, 1986, with Millon's contractarianism, 1993).⁶⁸ They share a commitment to an objectivist epistemology, a realist ontology,⁶⁹ 'value-free research',⁷⁰ and the incorporation of neo-classical economic axioms like efficiency, agency theory, the contract, rational action, and wealth maximisation (Chua, 1986, pp. 605-606; Davies, 20023, p. 46; Millon, 1993, p. 1378).⁷¹ Equally, there is strong interrelationship between positivism and modernism.

⁶⁶ Legal positivism is interchangeably referred to as liberal legal theory and contractarianism (Davies, 2002).

⁶⁷ Chua (1986) [accounting] and Davies (2002) [law] outline the core epistemological and ontological assumptions underpinning positivist research.

⁶⁸ Within contractarianism, individuals are free to contract for what they are willing and able to. This reflects the ubiquitous dispute concerning Hobbes' private citizen (1651) and Rousseau's social justice (1762). The core tenets of contractarianism include shareholder primacy, anti-regulation, individualism, and free market (Millon, 1993, p. 1383). Contracts specify all rights and obligations (Millon, 1993, p. 1378). In accepting classical Hobbesian social contract theory, citizens acquiesce to 'accepted' State constraints provided that individuals are autonomous and free from external, non-consensual restraint:

Legal rules that redistribute wealth, mandate particular forms of behaviour, or prevent people from making bargains they would otherwise choose to make are presumptively objectionable because they interfere with people's ability to live their own lives according to their own preferences, structuring their relationships with others and defining their duties toward them by means of consent (Millon, 1993, p. 1382).

⁶⁹ Social reality exists as an 'objective reality' independent of human accounts (Chua, 1986, p. 607). There is subject/object dualism and there is 'truth' to objects irrespective of human 'constructions'. Positivists recognise little of the socially constructed nature of the world and the role of the researcher in research, findings, and presentation (Davies, 2002, p. 36).

⁷⁰ Positivists commit to 'value-free research', providing technical answers to pre-conceived questions, in a value-free account of the world. In a means-end dichotomy, researchers do not comment on ends, as ends are 'value judgments', and as values are a matter of taste, they cannot be discussed rationally: ends are wholly subjective. Thus, researchers technically provide the means to the ends through employing scientific methods to rid an individual of subjectivity (Chua, 1986, p. 610; Hart, 1965, p. 110-125; Davies, 2002, p. 24).

⁷¹ Consequently, as society is a rational enterprise, there is a reliance on expert research. PAT and contractarians are 'experts'. See Millon's (1993) depiction of contractarianism, which invoke agency theory principles from accounting, and PATs depiction of agency theory and the notion of 'contract', which draws on legal definitions (Moore, 1991).

Positivist researchers concentrate on explaining social phenomena, but accept the status quo and structures as given.⁷²

There are three reasons for the inappropriateness of positivism in this thesis:

- a) First, this research is not about explaining and predicting likely outcomes of regulatory use of cost accounting. Although the thesis explains current regulation, it is focused on a historical, political, social, and cultural mediated depiction of shifting telecommunications regulation. There are no pre-conceived ends here: the goal is not to identify the means to achieve those ends, the best costing method to achieve a particular regulatory goal or how best to measure costs within a particular regulatory costing methodology;
- b) Second, given the arbitrariness and choice inherent within costing, accounting, regulation, law, and their interfaces are socially constructed. Hence, it is inappropriate to separate objects from subjects, and deny the politically constructed processes of accounting, law, regulation, dependent on human actors; and
- c) Third, as the ‘political interface’ is vital, the theoretical and methodological approach must consider the role of language and rhetoric about costs in constructing the social world, subjects’ positions, and their identity.

However, before developing these critiques, the influence of positivism on law and accounting is outlined:

- a) The paradigm shift in accounting to positivism was a response to normativism. Positivists challenged the evaluative capacity of normativism by focusing on explanation and prediction. Watts and Zimmerman popularised PAT by claiming it:

⁷² These theoretical foundations relate to modernity:

- 1) This relates to modernity’s acceptance of master and meta-narratives of history, culture and national identity, as myths of cultural and ethnic origin are similarly ‘given’ (Cilliers, 1998, p. 113; Skinner, 2006, p. 4; Wright, 2004).
- 2) There is faith in totalising explanations of history, science and culture (Skinner, 2006, p. 1), and in “Grand Theory” representing and explaining all knowledge. For example, PAT searches for law-like generalisations (Chua, 1986, p. 608), and provides the logic behind the discourse of representative samples, validity (external and internal), and generalisability. Equally, the logic of contractarianism provides a rationale for ‘all’ human action (Millon, 1993).
- 3) There is a master narrative of progress through science and technology (Friedman, 2001, p. 501). Thus, positivists focus on ‘scientific’ modes of inquiry, such as the hypothetico-deductive model (Chua, 1986) or hold that accounting and law are ‘like physical science’ (see Lloyd, 1983 and Chua, 1986).
- 4) Law and accounting replicate Durkheim’s “cult of the individual” (1938; 1952; 1964) through rationalism, wealth maximisation, and agency theory (through positive contract theory).

... is concerned with explaining accounting practice. It is designed to explain and predict which firms will and which firms will not use a particular method ... but it says nothing as to which method a firm should use (Watts & Zimmerman, 1986, p. 7).

Positivism became the dominant research paradigm in accounting (Watts, 1995, p. 299). Agency theory focuses on how accounting can facilitate relationships between individuals who provide resources to the organisation and those who manage the resources explains the necessity for information and controls (Deegan, 2006, p. 218). Important theoretical influences within PAT include the Efficient Markets, bonus, debt, and political cost hypotheses.

- b) The influence of positivism in law stretches back to jurists including Locke (Cotterell, 1992, p. 15). The fundamental notion of legal positivism is that “[l]aw is ... both prescriptive norm and descriptive fact” (Cotterell, 1992, p. 8). Law is prescriptive because it specifies how subjects should behave, while descriptive because only effective prescriptions affect “the way people think or behave” (Cotterell, 1992, p. 10; Hart, 1965, p. 113; Himma; 2003, p. 153; Raz, 1992, p. 56).⁷³ For positivists, valid law is the sum of a set of social facts: it is a social creation or artefact (Hart, 1965, p. 92; Adler, 2006, p. 730; Himma, 2004, p. 717). However, legal positivists, like their accounting counterparts, maintain a strict conceptual separation between law and morality (Hart, 1965, p. 180; Himma, 2004; Sebok, 2004, p. 30, Austin, 1995, p. 29), e.g. Hart denies, “laws reproduce or satisfy certain demands of morality” (1965, pp. 181-182).

The influence of positivism on law and accounting has resulted in a common focus on describing a world consisting of objective fact-nets due to an objectivist epistemology and realist ontology. However, there are differences over objectivity: accounting maintains a strict separation between subject and object whereas legal positivists hold that law is an accepted social creation that takes on objective characteristics (Davies, 2002, p. 35). However, positivism in both disciplines maintains a separation between means and ends, seeing morality and ethics as subjective and

⁷³ Legal positivism develops legal formalism (the dominant legal doctrine from 1850-1930). Legal formalism encapsulates the scientific method of law (Cotterell, 1993, p. 56) and holds that law is logical and internally coherent, with legal decisions deducible by formal reasoning (Cotterell, 1993, p. 11; Frank, 1970, p. 133). Formalists are indifferent to substantive justice, as “moral standards, ethical behaviour and, crucially, questions of justice are eliminated from legal reasoning” (Adelman & Foster, p. 3; Cotterell, 1993, p. 58). For a formalist, law is a rational and scientific discourse, as an “expression of a conscious desire to understand and control the material world” (Adelman & Foster, pp. 2-3). Thus, legal positivism develops legal formalism, as legal positivism theorises from a legal system’s viewpoint, while legal formalism theorises the judge’s standpoint (Hasnas, 1995, p. 91). Formalists stress the internal coherence of the law (Adelman & Foster, p. 1), while positivists stress law’s ultimate source, such as the “rule of recognition” (Hart, 1965, p. 92). Nevertheless, the ‘basic function of law’ is the provision of an accountable mechanism for dispute resolution (Cotterell, 1992, pp. 58-59).

consequently, incapable of rational discussion (Cotterell, 1992, p. 60; Chua, 1986, p. 60).

Although the influence of positivism is similar, there are three major differences:

- 1) Legal positivism recognises the prescriptive side of positivism, seeing one of law's functions as prescribing acceptable social behaviour. PAT reluctantly accepted this effect (see Arrington & Schweiker, 1993 and Watts & Zimmerman, 1990). Legal positivists use the prescriptive nature of law to demonstrate the descriptive facts about how laws affect social behaviour ('successfully') (Cotterell, 1992, p. 8).
- 2) Legal positivism acknowledges social influences on the development of law, seeing law as a 'social artefact'.⁷⁴ PAT has been less forthcoming, requiring the insight of post-positivists.⁷⁵ Both disciplines incorporate objectivism, but slightly differently: successful laws constitute objective facts; in accounting, facts 'exist' (Hart, 1965; Chua, 1986); and
- 3) Despite a common focus on grand theorising (a tenet of modernism), the method of deducing these theories is different. PAT is influenced by scientific methods of discovery, particularly the hypothetico-deductive model and the generation of law-like generalisations (Chua, 1986, p. 608). Law, however, is little influenced by scientific methods, and although it is interested in grand theorising, this was developed largely devoid of methodological focus (see Cotterell, 1992; and Davies, 2002).

⁷⁴ There is an historical issue worth recognising. PAT developed as a response to normativism in accounting theory. Thus, there is a focus on the status quo. Legal positivism developed, in part, as a response to the dominance of the Church on law and natural law, which held that God was the Divine source of law. In holding to its modernist tenets, legal positivism held that law was a product of man, not God, and thus was more accepting of the social influence on law (Davies, 2002).

⁷⁵ Positivism's link to empirical science continues to be strong, as research is still about discovery, rather than ascription of meaning. However, three important 'post-positivist' trends challenge "naïve positivism":

- 1) The theory-laden nature of observation challenges the researcher's ability to be 'objective' in observation (Chalmers, 1982, p. 24). The researcher's subjectivity affects the ability to mirror observable data as it happens and there are no 'brute' facts but merely partial observations.
- 2) Post-positivists are more comfortable with competing 'interpretations' of observable data, as competing theories consistent with available evidence may exist; positivists should not succumb too readily to the "tyranny of prevailing concepts" (Chalmers, 1982, p. 60).
- 3) 'Convenient fictions' are vital. As not all things are observable, parts of the scientific discourse could be unacceptable, such as the theory of gravity. Thus, although it is impossible to observe gravity directly, it is possible to observe gravity's effects. Thus, convenient fictions constitute 'facts' that are not directly observable (Chalmers, 1982, p. 129).

These constitute attempts by positivism to move forward and respond to the challenges from different paradigmatic and scientific groups. However, the core theoretical framework remains the same and remains inappropriate for this thesis.

Equally, the epistemological and ontological assumptions of positivism have had a strong limiting effect on law and accounting:

- 1) Positivism initially provided a strong intellectual stimulus for accounting research but its rationality and rhetoric caused concern amongst accounting academics (see Arrington & Francis 1989; 1993; Arrington & Puxty, 1991; Arrington & Schweiker, 1992; and Chua, 1986). For some, positivism *stifled* accounting research (Christenson, 1983; Sterling, 1990; Williams, 1989; Chambers, 1993; and Deegan, 2006) as many accounting researchers saw it as the only way to research (Deegan, 2006, p. 256), e.g. consider the dominance of positivist accounting journals in the USA (Arrington & Schweiker, 1993); it restricted acceptable research methods and topics (Deegan, 2006, p. 258) by failing to accept that some methods are *only applicable* for certain topics, and finally, it judged other paradigmatic research by PAT criteria, irrespective of the underlying epistemology or ontology (Deegan, 2006, p. 259). Thus, PAT is critiqued as scientifically flawed; a dead philosophical movement (Christenson, 1983, p. 7); imperiously dictatorial; empty and commonplace; a cottage industry; wasted effort (Sterling, 1990, pp. 97, 121, 130, 132); as logically incoherent (Williams, 1989, p. 459); marred by oversights, inconsistencies and paradoxes; and responsible for turning back the research clock 1000 years (Chambers, 1993, pp. 1, 22). Christenson comments that:

We are told ... that 'we can only expect a positive theory to hold on average' ... By arguing that their theories admit exceptions, Watts and Zimmerman condemn them as insignificant and useless (Christenson, 1983, p. 18).

Sterling continues:

[PAT] cannot rise above giving the same answers because it restricts itself to the descriptive questions ... What are the potential achievements [of PAT]? I forecast more of the same: twenty years from now we will have been inundated with research reports that managers and others tend to manipulate accounting numerals when it is their advantage to do so (Sterling, 1990, p. 130).

Tinker, Merino and Neimark (1982) and Tinker (1988) examined the normative origins of PAT, and Arrington and Schweiker argue that researchers, including positivists, use rhetoric:

Even the most strident of positivists cannot advance knowledge claims about accounting without a great deal of rhetorical effect. Why? The answer to that question resides in carrying out the implications of Watts & Zimmerman's (1986) correct claim that 'empirical research is not a question of discovering facts about accounting and auditing' (p. ix). The indeterminacy of 'facts' of accounting relates to rhetoric through recognition of the *linguistic* character of knowledge ... Language, not 'facts', is thus the empirical stuff of knowledge. This simple, all too obvious, fact – that knowledge can only be linguistic – avoids a great deal of confusion and a bit of scholarly pretence about the nature of accounting knowledge (Arrington & Schweiker, 1993, p. 516) [Emphasis in original].

In response, Watts and Zimmerman conceded certain arguments; they confessed to PATs normativity (Arrington & Puxty, 1991, p. 33) and that

positivist research cannot be value-free (Deegan, 2006, p. 256) given the self-interest paradox:

Researchers choose the topics to investigate, the methods to use, and the assumptions to make. Researchers' preferences and expected payoffs (publications and citations) affect their choice of topic, methods, and assumptions (Watts & Zimmerman, 1990, p. 266).

- b) Despite liberating law from the effects of the Church, legal positivism has also been constraining, particularly by separating morality and law. It is criticised for its 'scientific' view of law and for ignoring influences like history, politics, public policy, and coercion (Frank, 1970; Cotterell, 1992; Cohen, 1935; Davies, 2002). Critics claimed that positivism downplayed the role of 'man' in creating and interpreting law (Cardozo, 1990; Davies, 2002) and law could not be neutral due to the influence of politics, society, and economics (Frank, 1970; Cohen, 1935; Davies, 2002). Millon's communitarianism criticises legal positivism for subordinating interested stakeholders: shareholder wealth maximisation *requires* employees, the environment, and the community to be conceptualised in a manner enabling the corporation to maximise wealth irrespective of broader social costs. Millon argues:

... life chances should not depend entirely on accidents of birth and bargaining power: people are entitled to more out of life than what they can pay for (Millon, 1993, p. 1383).

Equally, 'efficiency' is incomplete:

References to efficiency simply beg the underlying question of why efficiency should provide the sole normative criterion. As a society, we have not embraced the market as a totalising model for the definition of rights and responsibilities (Millon, 1993, p. 1386).

In summary:

[j]ustice does not require endorsement of the existing distribution of wealth and bargaining capability (Millon, 1993, p. 1386).

These critiques noting the 'stifling' effect of positivism provide three reasons for rejecting positivism as an appropriate paradigm for this thesis.

A *Evaluating Positivism and the Interface of Law and Accounting*

Watts and Zimmerman are merely Hobbes in drag (attributed to Arrington by Williams)

First, the research goal is not to explain and predict seeing "accounting [a]s teleological action" (Arrington & Puxty, 1991, p. 31), but rather "the relation between accounting action and human interests" concerns this thesis (Arrington & Puxty, 1991, p. 31). The desire is to analyse and challenge the interface of law and accounting

exemplified in the adoption of cost accounting as a regulatory tool. Second, PAT's view of 'accounting as teleological' justifies the move from positivism, as this thesis focuses on the arbitrariness and choice inherent within cost. It maintains that costing, accounting, regulation, law, and their interface is socially constructed and it is inappropriate to separate objects and subjects. Third, 'social facts' are rhetorically and discursively constructed, and accounting, law, and regulation play a vital role in the rhetorical construction and maintenance of social facts. Positivist methodology sadly does not accept such a position despite telecommunication regulation being political. This is particularly with respect to the public good nature of telecommunications, where in a communitarian sense, the regulatory environment guarantees a universal level of service provision to those that would otherwise not have access to telecommunications services. Society may not have access to this level of service provision without regulation, and this reinforces Millon's claim that "people are entitled to more out of life than what they can pay for" (1993, p. 1383).

In summary, the preceding sections identified the theoretical tenets of PAT, noting links to modernism, legal positivism, and contractarianism. The critiques of positivism demonstrated its inappropriateness for this thesis. Communitarian approaches suggest that a socially oriented theoretical framework might be suitable; consequently, the theoretical underpinnings of interpretivism need examination.

III WHY INTERPRETIVISM IN LAW AND ACCOUNTING IS AN INAPPROPRIATE PARADIGM

Interpretivism generates 'in-depth' social and cultural understandings of social phenomena. There is an 'interpretivist' influence in this thesis but interpretivism is rejected as a theoretical framework because it avoids normative propositions and judgment (Crotty, 1998). Interpretivist research seeks understanding by describing 'what is' (verstehen) and its tools provide a unique examination of social phenomenon.

For interpretivists, ‘*verstehen*’ refers to social constructionism, an epistemological assumption that subjects construct the meaning of objects. For Crotty, constructionism:

is the view that all knowledge, and therefore all meaningful reality as such, is contingent upon human practices, being constructed in and out of interaction between human beings and their world, and developed and transmitted within an essentially social context (Crotty, 1998, p. 42) [emphasis in original].

Constructionism is not creationism (subjectivism) and it does not deny that objects exist, but rather that subjects construct meaning:

Meaning does not inhere in the object, merely waiting for someone to call upon it ... the world and objects in the world are indeterminate ... actual meaning emerges only when consciousness engages with them ... We need to remind ourselves here that it is human beings who have construed it as a tree, given it the name, and attributed to it the associations we make with trees (Crotty, 1998, pp. 42-43).

Human beings construct meanings as they engage with the world they are interpreting, so ‘meaning’ is both “objective” and “subjective”:

The world and objects in the world may be in themselves meaningless; yet they are our partners in the generation of meaning and need to be taken seriously ... objectivity and subjectivity need to be brought together and held together indissolubly. Constructionism does precisely that (Crotty, 1998, p. 43-44).

Consequently, no true or valid interpretation exists, but rather there are a multitude of interpretations: “useful”, “liberating”, “fulfilling”, or “rewarding” interpretations (Crotty, 1998, pp. 47-48). Interpretivists seek understanding by “examining culturally derived and historically situated interpretations of the social life-world” (Crotty, 1998, p. 66). Culture is a key theoretical tenet, for “without culture we could not function ... [c]ulture is best seen as the source rather than the result of human thought and behaviour” (Crotty, 1998, p. 53):

It is clearly not the case that individuals encounter phenomena in the world and make sense of them one by one. Instead, we are all born into a world of meaning. We enter a social milieu in which a “system of intelligibility” prevails ... a “system of significant symbols”. For each of us, when we first see the world in meaningful fashion, we are inevitably viewing it through lenses bestowed upon us by a culture. Our culture brings things into view for us and endows them with meaning and, by the same token, leads us to ignore other things. The social constructionism we are talking about here is all-encompassing and we need to be careful not to restrict its ambit ... All reality, as meaningful reality, is socially constructed. There is no exception (Crotty, 1998, p. 54).

Ontologically, Crotty acknowledges that constructionism is both realist and relativist. It is consistent with realism for not denying existence, hence positivist researchers that contrast 'constructionism' with 'realism' "are wide of the mark" (Crotty, 1998, pp. 63-64). Equally, constructionism is relativist as claims to "'the way things are' are really just 'the sense we make of them'" (Crotty, 1998, p. 64). Thus, a socially constructed world is realist and relativist, as "different worlds constitute for them diverse ways of knowing, distinguishable sets of meanings, separate realities" (Crotty, 1998, p. 64).

The most common strands of interpretivist research include ethnography, phenomenology, hermeneutics, and action research:

- a) Ethnography focuses on the meaning of experience, which requires an exploration of culture, and interaction through symbolic interactionism. Ethnographers interact through understanding 'significant symbols' that humans share and through which they communicate. Thus, through dialogue, researchers can become aware of individual and social group perceptions, attitudes, and feelings. Crucially, in considering 'what is', culture is not questioned, nor criticised, due to the risk of cultural relativism. An ethnographic researcher seeks to observe as closely as possible, and become an insider, compiling ethnographic material through various methods, including dramaturgical; games; negotiated-order; labelling; and grounded theory (Crotty, 1998, pp. 76-78).
- b) Phenomenology "... is a reflective enterprise, and in its reflection it is critical" (Larrabee, 1990, p. 201), encouraging us to return to the 'things themselves', those phenomena present in our consciousness. Predominant phenomenological schools include the Hegelian (1807), Husserlian (1931), and Heideggerian (1954). Hegel's "dialectical phenomenology" understands phenomena as 'conscious experience', whereby exploring our understandings provides a means of grasping the "absolute, logical, ontological and metaphysical Spirit behind phenomena" (Hegel, 1807). Husserl's "transcendental phenomenology" challenges the researcher to take the intuitive experience of phenomena present in conscious experience and extract the essential features of experience (Husserl, 1931). Finally, Heidegger's "existential phenomenology" relates to "Dasein" (1954), where phenomenology is a technique to apprehend the Being behind all beings.⁷⁶ The main phenomenological dispute concerns epistemology (Hegel) and ontology (Heidegger).⁷⁷ Phenomenology

⁷⁶ Chapter five discusses ontology and the ontic.

⁷⁷ Heidegger argued that philosophy was more fundamental than science itself. For Heidegger, phenomenology is a metaphysical ontology, as:

concerns consciousness: when the mind “knows” something, it embraces the object. In directing consciousness towards the object, consciousness shapes the object.

- c) Hermeneutics is the study of theories of interpreting texts (Crotty, 1998). Key theorists include Schleiermacher (1998), Dilthey (1910), and Heidegger (1971). Schleiermacher concentrated on ‘understanding’ human texts and communication, as reading text is similar to listening to a speaker (Crotty, 1998, p. 93). Dilthey “relat[ed] interpretation to all historical objectification”, in that historical consciousness characterises our world and us within the world (Dilthey, 1910, p. 4). Interpreting text involves a mediated understanding “of articulating what is expressed in the work” (Dilthey, 1910, p. 11). Heidegger’s ‘phenomenological hermeneutics’ shifts the focus to “existential understanding” (Heidegger, 1962, pp. 62), as a more ‘authentic’, direct, and unmediated way of being in the world. In challenging positivism, Heidegger’s existential hermeneutics argues that texts cannot be examined through scientific methods, as texts are “conventionalised expressions of the experience of the author” (Heidegger, 1962, p. 363). Consequently, interpreting texts illuminates something about social context and allows the reader to share the author’s experiences (Heidegger, 1971, p. 13).
- d) Action research focuses on increasing social science knowledge, by aiming to improve strategies, practices, and knowledge with researchers and institutions reflectively solving problems. Rapoport argues that:

Action research aims to contribute both to the practical concerns of people in an immediate problematic situation and to the goals of social science by joint collaboration within a mutually acceptable ethical framework (Rapoport, 1970, p. 499).

This definition emphasises the collaborative nature of action research, as well as the potential ethical challenges of action research. Different theories include participatory action research, action science, and co-operative inquiry (Reason & Bradbury, 2006)

Therefore, interpretivists seek a culturally mediated understanding of objects, subjects, and their interaction in socially constructing the meaning of their world. Ethnography, phenomenology, hermeneutics, and action research provide research platforms that allow researchers to gain this deep understanding of the social world.

There are subtle differences between interpretivism within law and accounting. Both have a common focus on understanding within a social and cultural context.

being is the proper and sole theme of philosophy ... Phenomenology is our way of access to what is to be the theme of ontology, and it our way of giving it deconstructive precision. Only as phenomenology is ontology possible (Heidegger, 1962, p. 60).

Husserl accepted that philosophy was a scientific discipline. For Husserl, Heidegger’s work is “neither ontology nor phenomenology, but merely abstract anthropology” (Husserl, 1970, p. 79).

However the adoption of universal principles such as justice, ‘best’, and community within legal interpretivism import an evaluative dimension largely absent from interpretivist work in accounting (Davies, 2002). These evaluative principles of justice, best, and community are not ‘critically evaluative’, but evaluate whether law serves community political and social ends (Dworkin, 1996). As Chapter three indicated, interpretivist management accounting research focuses on understanding the implementation and effects of tools and techniques in a social, cultural, organisational, or institutional context. Baxter and Chua’s review of ‘alternative management accounting research’ 1976-1999 draws out interpretive research trends (2003):⁷⁸

- a) The non-rational design school focuses on questioning presumptions of rationality in organisational choice, arguing that organisational goals are unstable, that the search for alternatives to problems is local and limited, and that the process of analysis and choice may be politically motivated, incrementally routinised by procedures, or more fortuitous than considered (Baxter & Chua, 2003, p. 98);
- b) The naturalistic approach focuses on investigating management practice in its “everyday” organisational context. Baxter and Chua consider this fragmented research due to a proliferation of research examining unique tools and techniques (2003, p. 99);
- c) Institutional theory focuses on socially-generated rules to explain collective behaviour through sociology and organisational theory. It concentrates on developing “cognitive and cultural explanations of institutions, focusing on the meaning and accomplishment of various rules that structure behaviour in organisations and society” (Baxter & Chua, 2003, p. 100); and
- d) Finally, Giddens’ structuration theory conceptualises the interconnection between individual agency and the reproduction of social structures. Within management accounting, “accounting systems are seen as ways of regularising organisational functioning across time and space” (Baxter & Chua, 2003, p. 101).

Consequently, interpretivist management accounting research focuses on understanding the contextual implementation and effects of tools and techniques. While there is an evaluative dimension, it concentrates on the implementation of tools in relation to

⁷⁸ Given the focus on problematising cost-based accounting regulation, Baxter & Chua’s (2003) categorisation of alternative management accounting research serves a useful purpose, representing relevant epistemological and ontological research traditions.

underlying theory or context rather than examining whether the accounting technology ‘best’ serves the ends of the context.

Legal interpretivism differs in that it focuses on the act of interpretation when applying law. The key legal interpretivist is Dworkin (1977; 1982; 1983; 1984; 1985; 1986; 1996). Law focuses on constructing legal rights and duties to best justify communal political practices. Dworkin argues that interpretation is fundamental to the nature of law and its application requires sensitivity to applicable values (Brink, 2001). The ‘act of interpretation’ in legal interpretivism concentrates on:

- a) What determines legal rights and duties? Interpretivism is about the nature of law. It views the propositions of law as true as they reflect a community’s political or social practices;
- b) What determines the content of the law? The focus is on examining and explaining the current legal state;
- c) The interpretive practice of law: “The interpretivist says that it is in virtue of the fact that our rights and duties *ought* to flow from past political decisions that they flow from them; or that, more abstractly, legal duties *ought* to be determined by social practices that they do” (Stanford Encyclopaedia of Philosophy).

Thus, Dworkin provides a rich framework for considering legal practice, the legal community, and the interrelationship between law, cultures, and society. However, as the following section explains, interpretivism is inappropriate for this thesis.

A Evaluating Interpretivism and the Interface of Law and Accounting

Crucially, the interpretivist paradigm accepts the socially constructed nature of reality. The cultural and historical mediation of accounting and cost, the telecommunications regulatory environment, and interested actors are important to this thesis. Interpretivism is an important break from positivism but it still has an overwhelming focus on understanding ‘what is’ at the expense of broader evaluation: e.g. interpretivist accounting tends to concentrate on understanding (and evaluating) the

implementation of an accounting technology but may not examine its normative aspects (Baxter & Chua, 2003). Equally, though legal interpretivism recognises the link between law and politics, the ends of politics are left unexamined (Davies, 2002). Given the desire to examine both means and ends and to examine the political, interpretivism is not an appropriate research paradigm. Specifically, it has four limitations:

- 1) The social construction thesis requires social actors to be constantly negotiating meanings attributed to objects and subjects. This implies that social actors engage in continuous reflection and monitoring of their conduct. In short, this is idealistic and perhaps impossible. Social groupings change and negotiate new meanings to the social world but this tends to be *ad hoc* and gradual (Crotty, 1998, p 80). This thesis examines how power imbalances and politics attack the construction of new meanings centred on cost. Some social groupings are ignored or excluded, and meanings are challenged when it is politically convenient;
- 2) The double hermeneutic problem illustrates that reality expressed in the language of social actors is problematic as interpretivists can only interpret the interpretations of others. As Mead's ethnographic research in Samoa illustrated, there are limits to how individuals interpret their social world, which can produce misleading research (Mead, 1928; Mead 1972). This research seeks in-depth understanding of the social landscape surrounding telecommunications regulation, cost, and the interface of law and accounting, but it wishes to break this 'hermeneutic circle' to engage in evaluation and critique;⁷⁹
- 3) Interpretivism fails to acknowledge the role and power of institutional structures. Interpretivists should be more interested in the historicity of structures, and not merely the structures that social actors believe they created. This thesis wishes to reflect on the genealogy of telecommunications regulation in NZ and cost accounting as structures, and the political and rhetorical construction of concepts by social actors (be they lawyers, accountants, regulators, or industry players); and
- 4) Hence, interpretivism is seen as inherently conservative by avoiding judgment, and possible sources of social change. Moreover, it can only account for the present without providing an account of historical change, whereas the forthcoming genealogical and political analysis of telecommunications regulation will examine the various influences on social change.

⁷⁹ See Chapter six for the logics of critical explanation which 'resolve' the problem of the double hermeneutic.

The preceding sections canvassed the theoretical tenets of interpretivism, the implications of social constructionism, and interpretivist research methods. While accounting and legal interpretivist research reflects the socially constructed nature of ideas, its focus on understanding and lack of judgement renders it inappropriate for this thesis. This suggests that critical theory may provide a better framework. This is examined below.

IV CRITICAL THEORY

Society is only present in human action, and human action always expresses and uses some or other social form. Neither can, however, be identified with or reduced to the other (Chua, 1986, p. 610).

Critical studies in law and accounting share similar theoretical foundations.

Chua depicts critical theory tenets as:

a) Human beings have unfulfilled inner potentialities:

... every state of existence, be it an individual or society, possesses historically constituted potentialities that are unfulfilled. Everything is because of what it is and what it is not (its potentiality) ... human potentiality is restricted by prevailing systems of domination which alienate people from self-realisation. These material blockages operate both at the level of consciousness and through material economic and political relations (Chua, 1986, p. 619).

Structural and social restrictions include our taken-for-granted beliefs about acceptable social practices, ideologies, and through “rules governing social exchange and [wealth distribution]” (Chua, 1986, p. 619).

b) “Social reality is, thus, both subjectively created and objectively real” (Chua, 1986, p. 620). Although subjects can construct reality, objects appear ‘objectively’ separate as subjects forget (or are prevented from remembering) that they play an active role in constructing meaning.

c) Human intention, rationality, agency, and truth are critically analysed as a product of their historical and material context (Chua, 1986, p. 620). Chua argues that:

Reality as a whole, as well as each particular part, is understood as developing out of an earlier stage of its existence and evolving into something else. Indeed, every state of existence is apprehended only through movement and change, and the identity of particular phenomenon can only be uncovered by reconstructing the process whereby the entity transforms itself (Chua, 1986, p. 620).

d) There is a focus on identifying power and power imbalances:

Fundamental conflict is endemic to society. Conflict arises because of injustice and ideology in the social, economic, and political domains which obscures the creative dimension in people (Chua, 1986, p. 622).

- e) Critical analysis identifies and challenges domination and ideological practices, through historical, ethnographical and case study:

Thus, like the interpretive researcher, it is accepted that social scientists need to learn the language of their subject/object. The process of coming to an understanding is also agreed to be context-dependent as social scientists are necessarily immersed in and engaged with their socio-historical contexts. However, critical researchers argue that interpretation *per se* is insufficient. It cannot appreciate that the world is not only symbolically mediated, but it is also shaped by material conditions of domination. Language itself may be a medium for repression and social power (Chua, 1986, p. 621).

There is an over-arching concern with social change by demonstrating that objectivity and social norms are products of domination and ideology.

1 Critical Theory and Methods

Critical scholars focus on de-reifying the 'taken for granted nature' of social life and institutions: e.g. Sherer and Arrington (1989) identified and critiqued the embedded masculinity in calculating accounting income. This de-reification exposes inequality and injustice within accounting in an effort to transform accounting. Critical research employs research methods to unpack the 'taken for granted' nature of social order, structures, and practices, by highlighting how social structures and practices dominate and alienate social actors from realising their full potential (Kincheloe & McLaren, 1994, p. 140). Therefore, critical theorists employ interpretivist research methods including ethnography, participant observation, interviews, discourse analysis, grounded theory, and case studies but the intended analysis differs. Common critical theory research methods include:

- a) Historical analysis is used to unpack historical conditions of social reality so as to understand social concepts and the effects of a set of historical and social conditions (Chua, 1986, p. 620).
- b) Dialectical analysis uncovers oppressive forces in society by exposing contradictions in the reasoning of opposing forces. Through the dialectic of opposition, individuals and groups become aware of oppressive forces and can challenge the existing state of affairs.

- c) Ideology critique examines the economic, social, cultural, and political conditions of 'political' statements and actions to identify the effects of dominant ideologies on social life. In particular, it aims to expose the embedded nature of dominant ideologies in everyday situations and practices. Ideology critique penetrates everyday reality to reveal the 'fundamental conflicts of interest', inequities and oppression that are endemic to the existing social order (Chua, 1986, p. 621).

The following section focuses on the disciplinary application of critical theory.

A *Critical Accounting*

Critical accounting challenges the dominant view that accounting is “an objective, value-free, technical enterprise, representing reality ‘as is’” (Morgan, 1988, p. 477). Critical accountants argue that accounting:

- a) developed as a tool for the maintenance and continuation of the power relationships within society;
- b) is a social and technical process in ‘itself’;
- c) is subject to contextual and cultural variation between accountants and accountings; and
- d) discourse creates and sanctions conceptions of ‘truth’.

In illustrating the norm-shaping potential of accounting, critical accounting research questions the “very foundations of accounting knowledge” (Neimark, 1990, p. 105).

Critical accountants aim to:

[t]ear accounting from its foundations in modernist/Enlightenment ontology and epistemology and to situate accounting in the world of lived experience as both a product of social construction and as an architect of social experience (Neimark, 1990, p. 106).

In demonstrating the powerful discourse of accounting, critical accountants expose how accounting dehumanises human beings by reducing social relations to measurable, countable entities, by excluding them from measurement, or by ignoring broader social and environmental issues.

In critiquing the positivist paradigm and practice of accounting, critical accounting argued that:

accounting, far from being a practice that provides a *neutral* or *unbiased* representation of underlying economic facts, actually provides the means of maintaining the powerful positions of some sectors of the community (those currently in *power*, and with *wealth*) while holding back the position and interests of those without wealth. These theorists challenge any perspectives which suggest that various *rights* and *privileges* are spread throughout society – instead they argue that most rights, opportunities and associated power reside in a small (but perhaps well-defined) *elite* (Deegan, 2006, p. 456).

Consequently, critical accounting developed diverse challenges to accounting, accountants, and their social and political effects:

- a) Critical accountants demonstrate that partisan nature of accounting by examining the role of accounting in constructing and legitimising structures and the social. Researchers “seek to highlight, oppose, and change the perceived role of accounting in supporting the privileged positions of some people in society (Deegan, 2006, p. 458; Baker & Bettner, 1997; Hines, 1988; 1991, Hopper *et al*, 1995; Rieter, 1995);
- b) Critical accountants challenge “the legitimacy of neoclassical theories of interests” (Arrington & Puxty, 1991, p. 34) by demonstrating the influence of social theory debates including “welfare economics, the sociology of professions, and social, moral, and political philosophy” (Arrington & Puxty, 1991, p. 34):

Instead of assuming a basic harmony of interests in society which permits an unproblematic view of the social value of accounting reports, a political economy of accounting would treat value as essentially contested, with accounting reports operating in specific interests (e.g. of elites and classes) (Cooper & Sherer, 1984, p. 218).

Political economy demonstrates that accounting is interested and a contestable social practice (Tinker, 1980, Tinker, Merino & Neimark, 1982, Cooper & Sherer, 1984; Armstrong, 1985, Neimark, 1986; Arrington & Francis, 1988, Lavoie, 1987);

- c) Marxist critical accountants illustrate that accounting is a powerful tool for the maintenance and enhancement of power and wealth of capital. Marxist research suggests that power and wealth are unstable and owners of capital act to protect their privileges, power, and wealth. (Bryer, 1993; 1994; 1995; 1999a; 1999b; Chiapello, 2003; Cooper & Taylor, 2000; Gray, Owen & Adams, 1996; Macve, 1981; 1999; Marsden, 1997; 1998; 1999; Puxty, 1986; 1991; Tinker, 1980; 1985; 1999; 2001; 2005);
- d) Critical social and environmental accountants like Gray, Owen and Adams argue that social and environmental accounting is often guilty of accepting the status quo and failing to examine structural and social equities (Gray, Owen & Adams, 1996, p. 47). This ‘passive acceptance’ reinforces the status quo (Puxty, 1991; Hopper & Powell, 1985). Critical accountants question social and environmental ‘interventions’ arguing that they are ‘captured and subverted’ by the corporate world (Tinker & Gray, 2003);

- e) Various critical accountants interrogate the interrelationship between social practices and accounting (primarily from a non-Marxist perspective). Particular social issues and practices examined include:
- i) Deep Ecologists concentrate on the trade-off between “economic performance and ecological damage - they question the morality of systems that justify the extinction of species on the basis of associated economic benefits” (Deegan, 2006, p. 464; Birkin, 1996; 2000; Maunders & Burritt, 1991; Milne, 1996; and Gray, Owen & Adams, 1996);
 - ii) Feminists argue that accounting maintains and reinforces the masculine, e.g., by favouring success over cooperation and respect (Sherer & Arrington, 1993; Lehman, 1988; Cooper, 2001; Carnegie, McWatters & Potter, 2003);
 - iii) Accounting legitimises and maintains particular political ideologies. Mouck (1992) argues that the ‘ultra-conservative’ politics of PAT supported those in political power. Cooper and Sherer (1984) note the link between ‘economic consequences analysis’ and the hesitation in adopting accounting regulation. The interests of shareholders and managers were favoured at the expense of society as a whole (e.g. Thompson, 1978 and Burchell *et al*, 1980 studied the motivations behind research into inflation accounting). Hopper *et al* (1995) notes the tendency of the focus of research to shift as the views of the powerful change (also see Hopper & Powell, 1985); and
 - iv) Accounting education is critiqued for promoting capitalism and corporate capture (Collison, 2003). The ‘gatekeeper’ approach of accounting journals is criticised for ensuring that published research is acceptable to dominant social groups (Arrington & Francis, 1989; Arrington & Puxty, 1991; Mouck, 1992; Tinker, Lehman, & Neimark, 1991).

This general overview of critical accounting provides the framework to consider the interventions of critical management accounting, which concentrates on the use of accounting techniques in controlling the social, cultural, and environmental. Baker and

Bettner comment:

Accounting’s capacity to create and control social reality translates into empowerment for those who use it. Such power resides in organisations and institutions, where it is used to instil values, sustain legitimising myths, mask conflict and promote self-perpetuating social orders. Throughout society, the influence of accounting permeates fundamental issues concerning wealth distribution, social justice, political ideology and environmental degradation. Contrary to public opinion, accounting is not a static reflection of economic activity, but rather is a highly partisan activity (Baker & Bettner, 1997, p. 293).

In particular, Puxty critically analyses management accounting as:

... a set of social practices that delineate the space within which the activity of the workforce might be made visible and susceptible to rational calculation ... [it] is an instrument within which an enterprise that facilitates the exploitation of, and extraction of surplus value from, its employees by the capitalists interests, through management, control the accounting system (Puxty, 1993, p. 4).

In developing Puxty's argument, Baxter and Chua's categorisation of 'alternative management accounting research' identified three strands of critical accounting work:

- 1) The radical alternative links management accounting research to "the politics of emancipation", drawing upon Marx, the Frankfurt school, and labour process theory. This research focuses on highlighting "the role of management accounting in the creation and perpetuation of an unequal society" (Baxter & Chua, 2003, p. 99).
- 2) Foucauldian archaeologies generate "new histories", which are "the social and organisational practices and bodies of knowledge' that enable particular management accounting technologies to emerge at given times and places". Work on 'discipline' and 'docility has been used to "deliver provocative constructions of management accounting control" (Baxter & Chua, 2003, p. 101).
- 3) Latour's actor-network theory concentrates on "understanding accounting technologies in the context of networks of human and non-human 'actants'" (Baxter & Chua, 2003, p. 102).

Baxter and Chua deduce a set of common critiques in critical management accounting research, including criticisms of:

- a) Means-end reasoning: "severing the connection between organisational goals and management accounting practices" (Baxter & Chua, 2003, p. 102);
- b) The real: "problematizing the constitution of 'reality' by characterising it as a product of ongoing or interpretive acts" (Baxter & Chua, 2003, p. 103);
- c) Accounting's impotence: "management accounting technologies cannot be separated from the formation and exercise of power in organisations and society" (Baxter & Chua, 2003, p. 104);
- d) Accounting change: challenging "purposeful and predictable change" (Baxter & Chua, 2003, p. 105); and
- e) Bodiless forms of management accounting practice: "to appreciate the roles of particular organisational participants in constituting and conveying the technologies of the craft" (Baxter & Chua, 2003, p. 107).

Consequently, critical accounting, generally, and critical management accounting research, specifically, provides a foundation for this thesis. Equally, the next section examines the scope of critical theory in law.

B *Critical Legal Studies*

One must start by knowing what is going on, by freeing oneself from the mystified delusions embedded in our consciousness by the liberal legal world view
(Freeman, 1981, p. 1229).

Critical legal studies [CLS] argue that law:

- a) developed out of the power relationships within society;
- b) supports the interests of those that form law; and
- c) legitimises society's injustices.

Law is not neutral or value free and attempts to disguise its political nature (Cotterrell, 1992, p. 136), as the rhetoric of equality, rights, and the rule of law rationalises the existing political order. CLS challenges legal judgment as logically flawed and biased. CLS sees law as legitimising social injustices through a 'mask' of beliefs and prejudices. Law is an instrument of oppression used by the wealthy and powerful to maintain the hierarchy, particularly through the protection of property rights. Thus, CLS seeks to delegitimize and demystify the law, as legal discourse reifies social and political relations between people (Cotterrell, 1992, p. 136). CLS deconstructs the ideological base of law, focusing on the indeterminacy of legal language, the relationship between law and society, and the discursive power of 'law' (Cotterrell, 1992, pp. 134-137).

1 *CLS: Beyond Realism*

Legal realism challenged the ‘syllogistic reasoning’⁸⁰ of legal formalism,⁸¹ arguing that judges actively make decisions. Realists challenge the scientific nature of law by demonstrating the fallibility of syllogism: law is more than applying logic as judges must take particular views on the law (Frank, 1970, p. 126). Realists argue that various factors influence judges including relevant histories, public policy, colour, and odour (Cotterrell, 1992, p. 64); and that legal reasoning is not neutral as the political, social, and economic environment influences judges (Frank, 1970, p. 136; Cohen, 1935, p. 107). Davies argues, “judges simply [cannot] step outside of their own social conditioning” (2002, p. 175), as law is ‘made’. Cardozo emphasises the human element in the interpretation and construction of law (1990, p. 99). However, CLS is “beyond realism” (Davies, 2002, pp. 174-176), as CLS incorporated ideology to deconstruct legal doctrine. The following overview examines CLS.

2 *CLS Movements*

CLS focuses on the political and ideological motivations underpinning law, examining the relationship between law and liberalism (Davies, 2002, pp. 167-169; Cotterrell, 1989, pp. 210-211). CLS scholars identified “various Liberal atrocities committed against everyone from law students to minorities” (Austin, 1993, p. 2), as the law:

... reflects ideological struggles among social factions in which competing conceptions of justice, goodness, and social and political life, get compromised, truncated, vitiated, and adjusted (Altman, 1986, p. 217).

Consequently, CLS scholars, like critical accounting, developed a plurality of epistemological and ontological interventions including feminist legal studies, critical

⁸⁰ A form of reasoning using syllogisms to draw conclusions from a series of premises, where syllogisms are arguments made over several parts, in which two or more statements assumed to be true lead to a conclusion.

⁸¹ See the link between positivism and formalism above.

race theory, post-structuralism, and Marxist analyses (Boyle, 1985; Brosnan, 1987; Goodrich, 1993; Kennedy, 1983; 1998; More, 2003; Tushnet, 1991; 2005). For example:

- a) Feminist jurisprudence challenges the political, economic, and social equality or inequality of gender through distinct interventions: traditional; radical; Black; lesbian; and post-modern (Davies, 2002, p. 205; Cotterell, 1992, p. 121). Traditional feminism, e.g. asserts that law should ensure equal opportunities as females are as rational as males; Black feminists celebrate and challenge differences between women, culture, and men (Crenshaw, 1989; MacKinnon, 1991; Galbraith, 2000); and radical (Marxist) feminists challenge the gender inequality and power imbalance from the male class dominating the female class (MacKinnon, 1983a; 1983b; 1987; 1989; Harris, 1989; Wittig, 1992). However, feminists commonly:
 - (i) identify and demonstrate how patriarchy shapes the content of law (Davies, 2002, pp. 198-199), including the patriarchal Human Rights discourse or the ‘reasonable man’ on the Clapham omni-bus (Graycar & Morgan, 1990).
 - (ii) challenge objectivity and impartiality of a judge’s perspective (Davies, 2002, p. 198; Kingdom, 1999), such that, in tort law, judges are experts at applying the reasonable middle-aged, greying, white male test (Todd, 2001, p. 309).
 - (iii) challenge gender-based distinctions and promote equal recognition of women’s rights (Davies, 2002, pp. 199-203).
- b) Critical race theory challenges law’s role in maintaining and supporting racism and segregation, and the rhetoric of white mythology and ‘white supremacy’ at the expense of persons of colour (Davies, 2002, p. 257, originally conceived by Derrida, 1982). Critical interventions include: *historical racism*: slavery, emancipation, and the effects of colonialism and post-colonialism; *whiteness*: objectification and reification of ‘white’; *economic segregation*: inequality of opportunities; and *race consciousness*: dehumanising and objectification of difference (Davies, 2002, pp. 271-272). Critical race theorists focus on:
 - (i) identifying how jurisprudence includes explicit or implicit assumptions about race (Davies, 2002, p. 271; Fanon, 1965): e.g. Aquinas’ Classical Naturalism did not regard persons of colour as equal before God and the law (Cotterell, 1992, p. 204).
 - (ii) challenging the objectivity and impartiality of judges (Young, 1990; Flagg, 1993), reflected in the profession’s domination by greying, middle-aged, white males (Harris, 1993).

- (iii) evaluating law's role in perpetuating racial and ethnic inequality and stereotypes, by challenging anti-discrimination laws for reifying racial separation and inequality.

In summary, CLS challenges law, its processes, and legal positivism and theory. Consequently, critical accounting can learn from CLS, due to its historicity, theoretical traditions, and common 'objectives'. The following section considers the interface of law and accounting from a critical perspective.

C Critical Legal Studies and Critical Accounting

Moore argues that comparing CLS and critical accounting is appropriate as law and accounting are similar professions with similar histories, they are tools of social and organisational control, and "the two professions have been overwhelmingly white, overwhelmingly male, and middle to upper-middle class" (Moore, 1991, pp. 765-766). Moore argues that the success of CLS has important insights for critical accounting, as CLS "has become the most powerful and divisive phenomenon since the 1930s in American academic law" (1991, p. 763). Moore details six observations about critical accounting in comparison to CLS:

- 1) Critical accounting and CLS criticise the realist epistemology that a 'reality consists of a world out there' (1991, p. 774), but critical accounting "suggests no serious or consistent consequences for its critique ... the critical attacks have placed nothing major at stake" (1991, p. 775). In contrast:
 - ... CLS makes clear what is at stake in this battle over reality: control over social 'facts', and control over the US Constitution (Moore, 1991, p. 775).
- 2) Accounting's application of Foucault is "politically conservative" (1991, p. 773);
- 3) Deconstruction is not 'a toy' or 'a game'; such concepts are used for "strategic convenience" (1991, p. 778), warning against deconstruction for the sake of deconstruction, due to the nihilistic critique of deconstruction (1991, p. 775).
- 4) Both law and accounting need to better critique the inherent 'positivist' assumptions in contract and contract theory (1991, p. 779).

- 5) CLS is “much more aggressive in pointing to the consequences of the various theoretical stances” (1991, p. 780). Moore develops three examples:
 - a) “Daily-life-of-the-law exposé”: CLS scholars have “go[ne] to the street to unmask what effects existing jurisprudence has on ... everyday, individual lives” (Moore, 1991, p. 781), including studies of the perpetuation of racial discrimination, how defining the ‘family’ detrimentally affects freedom for women, collective bargaining, and the patriarchal views embedded in definitions of rape and other sexual crimes.
 - b) “Maverick posture within the profession”: CLS scholars ‘take no prisoners’, as CLS scholars “see no difference between the standard legal theory they oppose and the institution that created it” (Moore, 1991, p. 782).
 - c) “Radical political program”: The CLS “program is anti-pure-capitalism and anti-hierarchical, quite experimental and often highly spiritual” (1991, p. 782). The development of ‘alternative programs’ is troubling for CLS, “but CLS does attempt to reach out and does engage many of its members in fighting concrete injustices” (Moore, 1991, p. 782).
- 6) Consequently, the differences between CLS and critical accounting include:
 - a) “[T]he traditionally polite and stewardly attitude of its professionals” (Moore, 1991, p. 783);
 - b) “The hopelessly indirect social-science prose style of accounting research” (Moore, 1991, p. 783);
 - c) “The effects of accounting may seem to be far more diffuse and far less dramatic ... [t]here are no media stars in accounting” (Moore, 1991, p. 783); and
 - d) “[A] lack of Critical self-declaration of community” (Moore, 1991, p. 783).

Moore’s call to arms for critical theorists including critical accountants is worth supporting. However, in unpacking Moore’s presentations of the nature of accounting and law, and by moving beyond ‘superficial similarities’, there are three core differences between law and accounting that challenge Moore’s analysis:

- 1) *In interdisciplinary research, differences are crucial*: Moore argues that law and accounting are theoretically similar, as “both claim as their base highly elaborated, identifiable bodies of written and unwritten rules of judgment and conduct” and operate under a precedent-based system

(Moore, 1991, p. 766). For Moore, disciplinary sources of rules (GAAP, statute, cases) are subject to similar judgment processes, with the auditor and judge 'objectively applying' relevant rules to concrete cases to arrive at an "impartial disposition" (Moore, 1991, p. 766).

However, there is little equivalence between the judgment processes of judges and auditors. While the auditor rhetorically lends credibility to accounting, judges and auditors exercise different roles for different purposes within significantly different contexts. Consequently, by focusing on the superficial similarity of 'judgment', Moore mystifies the interface of law and accounting.

- 2) *The Critical Audience*: Moore argues that CLS is clear about what it wants: control over social 'facts' (1991, p. 775). Moore criticises critical accounting for not defining its critical audience. However, this criticism is overly simplistic, as CLS appeals to democracy, particularly in relation to public law. This is more complex for accounting, despite constructing the accounting profession as serving a public function. As Cooper and Sherer argue:

A critical approach to accounting ... starts from the premise that problems in accounting are potentially reflections of problems in and of society and accordingly that the latter should be critically analysed (Cooper & Sherer, 1984, p. 184).

Critical accountants acknowledge that critical analysis is not enough on its own (Baker & Bettner, 1997, p. 305; Owen, Gray, & Bebbington, 1997, p. 183; Gray, Owen, & Adams, 1997, p. 63; Gray, 2002a; 2002b), as

... while critical accounting scholars have illuminated the partisan functioning of accounting, we have been less successful in transforming accounting (and social) practices (Neu & Cooper, 1997, p. 1).

However, the better comparison is between critical accounting and 'private law' CLS scholarship, where there is little recourse to 'democracy'. While there is 'public' space and 'public interest' in accounting, accounting's public forum is limited, as 'public' information is aggregated, technical, numbers-based, and representative, and there is little access to the decisions that accounting and auditors make in the pronouncement of the financial reports. Equally, despite law being 'more open' than accounting, many CLS scholars criticise attempts to 'privatise' the law (Kennedy, 1998, p. 465; Kelman, 1987).⁸²

- 3) *Differences in Public Awareness*: Moore argues that "the effects of accounting may seem to be far more diffuse and far less dramatic [in comparison to law]" (Moore, 1991, p. 783). However, although accounting is regularly in the media with profit announcements, share market activity, and scandals, the day-to-day practice of law is not in the public's attention. Comparatively, the public tends to have more knowledge of law (particularly criminal) than accounting, despite the widespread use of accounting discourse like budgeting, pricing, and profit,

⁸² Even under the positivist 'rule of law' citizens are entitled to know, access, and understand the implications of law (Fuller, 1964; Dicey, 1959).

and that much of our lives are judged and measured by accounting. Thus, CLS is more in the public psyche, irrespective of accounting holding a powerful role in daily life.

Critics claim that accounting is experiencing a “crisis of representation” (Morgan, 1988; Macintosh, 2002). Financial catastrophes such as Enron and WorldCom challenge the ‘myth of objectivity’ by demonstrating that accountants are ‘constructors’ of a ‘partial’, *particular* reality (Craig & Amernic, 2004). However, the history of accounting failure suggests that the public has short memories. Moore acknowledges the common misconception that law is about words and accounting is about numbers (1991, pp. 765, 766). Numbers reinforce the technical, objective image of accounting, as challenging numbers is difficult. Hines links this to the ‘profession’:

Since the objectivity assumption is the central premise of our society ... a fundamental form of social power accrues to those who are able to trade on the objectivity assumption. Legitimacy is achieved by tapping into this central proposition because accounts generated around this proposition are perceived as ‘normal’ ... The very talk, predicated on the assumption of an objective world to which accounting have privileged access via their ‘measurement expertise’, serves to construct a perceived legitimacy for the profession’s power and autonomy (Hines, 1991, p. 328).

Accounting is deceptively simple. The public face of accounting is the tip of the *iceberg* with the ‘real’ accounting process concealed from public view (Hopwood, 1990). McBarnet comments:

It is a technique of creative compliance to search for anything that can be construed as an authoritative rule, construct structures that comply with it in form but use it in unintended or unanticipated ways, then point to the rule to claim to merely complying with what the authorities expressly required ... Such practices are routine (McBarnet, 2006, p. 5).

Bratton states:

... practitioners often take advantage of GAAP’s rule structures when they design aggressive structures (Bratton, 2004, p. 23).

Although law is about gaining strategic advantage much of the adversarial judicial process is open to public scrutiny. This differs to accounting and a general comparison between law and accounting based on perceived similarities is unhelpful and potentially misleading: e.g. the public discourse surrounding Enron illustrates a marked degree of ‘surprise’, talking of fraud and ‘gaming the system’ (McBarnet, 2006, p. 6). Senator Thompson argued:

The real scandal here may be from not what is illegal, but what is totally permissible. If the GAAP allow the bookkeeping shenanigans that have been reported in the press then we should all go into the derivative business. It seems that all too often the name of the corporate game is to conceal the true financial situation of the company while doing the minimum amount of disclosure to avoid legal exposure (Senator Thompson, US Senate, 2002, in McBarnet, 2006, p. 6).

Thus, there are differences in the processes of accounting and law, as accounting is concealed through categorisation, representation, summation, and aggregation. Publicly, accounting is comparatively less contestable. However, accounting is internally adversarial: e.g. accounting concepts like assets, liabilities, and capital are subjective, value-laden choices. The evidence of adversary is lost in translating accounting to the technical categories and formal presentation of a set of accounts. Of course there are examples of public contestation of accounting figures particularly around 'costs' of various 'civil' projects, but the degree of this contestation is reduced from the public contestation of law and legal processes.

While law and accounting are similar, the subtle differences are made worse, not attenuated, by the existence of superficial similarities (Sperber, 2003, p. 2). To engage in informed debate concerning the lessons that CLS can teach critical accounting, it is necessary to consider the impact of these differences. Consequently, it is difficult to compare CLS to critical accounting, as these differences require significant translation between the two disciplines and critical movements.

Thus, in this spirit and in evaluating Moore, there are two CLS insights for critical accounting:

- 1) CLS research focuses comparatively more on the 'problem' and less on methodology than critical accounting. Moore criticises critical accounting for placing nothing major at risk (Moore, 1991, p. 775), arguing that the pre-occupation with methodology results in "[t]he hopelessly indirect social-science prose style of accounting research" (Moore, 1991, p. 783). Critical accounting is preoccupied with methodological issues (in response to PAT), and consequently is less focused on problem. For law, there is a plethora of research, but a dearth of research processes or methodology (also, to its detriment), as CLS research focuses more on the problem.
- 2) CLS has failed to maintain a critical stance (Davies, 2002, p. 193; Boyle, 1985). For Goodrich, CLS failed in its 'radicalism' because it focuses on "a reality whose object is defined by the citation of other critical legal texts" (1993, p. 420):

The politics of legal critique are the politics of a particular profession, a questioning of the law of law, and also a questioning of our place within and responsibility for the tradition. The marks of politics in the discourse of critique are neither familiar nor obvious: they do not relate directly to a specific content or program but rather to an ethics; they do not belong directly to a given tradition but rather to a necessarily ambiguous and potentially subversive place or space in the legal academy ... The politics of reason is not simply a local politics; it is oppositional, fragmentary, and frequently obscure (Goodrich, 1993, p. 422).

Fischl argues that CLSs failure to provide realistic alternatives to the dominant legal world-view resulted in its downfall (Fischl, 1992, p. 779). Many commentators argue that CLS lost its impetus through assimilation into the legal mainstream (Tushnet, 1992, Davies, 2002). The discussion above noted positivism's acceptance of the social influence on law, which was the original political motivation of CLS: i.e. although CLS succeeded in identifying the limitations of the realist epistemology underpinning legal positivism and in holding the law is politics, once these insights were accepted by the mainstream, the politics of CLS 'died' (Ellickson, 2000, p. 525).⁸³ Thus, as Davies comments, "[n]ot having anything substantial to argue over then, except the question of degree, the CLS debate with the academy has been defused" (2002, p. 194).

Critical theory's focus on criticality and the explicit analysis of ideology, politics, and power informs this thesis, but as the following section explains critical theory is an inappropriate paradigm for this thesis.

D Evaluating Critical Theory and the Interface of Law and Accounting

Despite the empirical focus on politics, ideology, historical and material conditions, and the identification of power and domination, this thesis' theoretical framework is not 'pure' critical theory, but rather a post-structural, post-Marxist DT, justified by a mix of theoretical, methodological, and personal reasons:

- a) Critical theory, particularly Marxism, supports modernity. Willmott *et al* argue that at the ontological level, "[critical theory's] ideal is the expertly designed, perfectly ordered and controlled world" (1992, p. 70). Postmodern criticisms demonstrate that the world is not particularly ordered (see Arrington & Francis, 1989; Hoskin, 1994; Montagna, 1997). Wickramsinghe and Alawattage argue, "[t]here are fragmentations, differences and complexities which cannot be captured by the ontology of modernism" (2007, p. 478).
- b) Critics argue that critical theory fails to account for contemporary society (Arnold, 1998). Epistemologically and ontologically, critical theory interventions promote singular universals such as labour, gender, or race, posing a politics of progressive social change where the universal goal is agreed upon and the movement seeks the necessary change to achieve that particular ends. This portrays an over-simplified 'picture' of a complex world (this is a controversial debate in accounting see Neimark, 1990;

⁸³ Tushnet argues this over-stated the death of CLS, commenting that: 1) "those who wrote important articles early in the career of critical legal studies continue to do so" and 2) "major components of critical legal studies have become the common sense of the legal academy" (Tushnet, 2005, pp. 99-100).

Hoskin, 1994; Armstrong, 1994; Grey, 1994, Miller & O’Leary, 1994; Froud *et al*, 1998; and Arnold, 1998).

- c) The double hermeneutic problem methodologically challenges critical theory. In particular, how does a critical theorist adopt a critical position while still being located in a particular cultural and historical context (interpreting the interpretations of others)? (Sarker & Pfeifer, 2006, p. 249). Sarker & Pfeifer explain:

... from a broader philosophical or sociocultural perspective, the problem is not necessarily one of bias. It may also reflect a clash between a scientific and a commonsense interpretation of human beings. In the case of such a clash, social and ethical issues are at stake, since the basic question is, Who is entitled to define the nature of human beings: the scientists or the people themselves? In this form, the methodological, ethical, and social problems of the double hermeneutic will continue to be a significant theme ... Sarker & Pfeifer, 2006, p. 249).

- d) Personally, I am sympathetic with the critical theory project, agreeing with Cooper and Hopper’s qualities of critical research (2006):

We did not want to [in defining critical accounting] constrain new approaches but instead articulate a broad church that not only included critiques of mainstream research but also work which stressed holism, dynamic socio-economic and historical contexts, the centrality of power and conflict, a broader set of constituencies than managers and capital markets, scepticism of absolutist beliefs in ‘scientific’ research methods and active engagement by researchers (Cooper & Hopper, 2006, p. 4).

Equally, I appreciate the Marxist project, although the economic deterministic aspects of structural Marxism, particularly Althusser, convince me less. However, this multi-faceted, interdisciplinary study (with different disciplines and interested parties including law, accounting, regulation, society, industry, government, social welfare, the public interest, accountants, lawyers, and regulators) requires a more open theoretical framework.

- e) I read post-structuralism as being a form of critical theory: I believe I am a critical theorist. However, many critical theorists disagree with this (see the debate between Neimark, 1990; Hoskin, 1994; Armstrong, 1994; and Grey, 1994, and the debate between Miller & O’Leary, 1994; Froud *et al*, 1998; and Arnold, 1998). In short, the post-Marxist, post-structural aspects of DT are appealing to me. Due to my unease over singular universals, economic determinism, and class reductionism, I enjoy the theoretical insights of DT for its challenge and development of critical theory, Marx, and structure.

To justify the development of Laclau and Mouffe’s DT, the chapter recognises the implications of post-structuralism, recognising post-structural research in law, accounting, and regulation.

V *THE CALL TO POST-STRUCTURALISM*

A *Definition: What is Post-structuralism?*

Defining post-structuralism is difficult:

It is best referred to as a *movement of thought* - a complex skein of thought - embodying different forms of critical practice. It is decidedly interdisciplinary and has many different but related strands (Peters & Wain, 2002, p. 61).

Post-structuralism's self-reflexive discourse is aware of the "tentativeness, the slipperiness, the ambiguity and the complex interrelations of texts and meanings" (Lye, 1996, p. 1). Post-structural detail is particular or local, characterised as a political philosophical reaction to the 'scientific' pretensions underpinning "structuralism" and the modernist norms of 'truth', 'objectivity', and 'progress'.

There is widespread confusion between post-structuralism and post-modernism (Peters, 1996; Jaworski & Coupland, 1999). This thesis employs a simple dichotomy: the object of post-modernism is modernism;⁸⁴ the object of post-structuralism is structuralism.⁸⁵ Thus, where structuralism and modernism intersect, post-structuralism overlaps with post-modernism but they are separate movements. However, post-structuralism should not convey homogeneity due to the array of 'post-structural' strategies in response to the structuralism characterising the work of Lévi-Strauss, Althusser, Lacan, and Barthes. In fact, there is 'contestation' over the appropriate term for the 'movement':

- a) Poster (1989) argues that "post-structural theory" names an American practice.
- b) Frank (1988) argues that 'neo-structuralism' would emphasise the continuity with structuralism.

⁸⁴ See the discussion of modernism above.

⁸⁵ Milner defines structuralism as:

... as an approach to the study of human culture, centred on the search for constraining patterns, or structures, which claims that individual phenomena have meaning only by virtue of their relation to other phenomena as elements within a systematic structure (Milner, 1991, p. 61).

- c) Harland's 'super-structuralism' (1987) captures all theorists identifying with structuralism and post-structuralism.
- d) For Sturrock, 'post' is an important signalling device:

Post-structuralism is not 'post' in the sense of having killed structuralism off, it is 'post' only in the sense of coming after and of seeking to extend Structuralism in its rightful direction (Sturrock, 1986, p. 137).

Peters and Wain argue further:

Poststructuralism, then, can be interpreted as a specifically *philosophical* response to the alleged scientific status of structuralism ... and as a movement which ... sought to decentre the 'structures', systematicity and scientific status of structuralism, to critique its underlying metaphysics and to extend it a number of different directions, while at the same time preserving central elements of structuralism's critique of the humanist subject (Peters & Wain, 2002, p. 61).

Finally, Machin and Norris comment:

'Post-structuralist' is a non- or even an anti-name ... the name pins the writer down, makes it possible to speak specifics, and offers a bootstrap by which talk about the new theory can raise itself above talk about the old. But this name also begs the question of another, previous name: ... 'structuralism' ... Structuralism offered criticism its last chance to make a science out of theorising literature ... we have the equally graphic 'post-structuralism', a term that seems not to name what we do in the present at all, but rather to re-name structuralism itself, as what we used to do in the past. It provides a post to which structuralism is then hitched, confining it by means of the shortest tether that language has to offer (Machin & Norris, 1987, pp. 1-2).

Post-structural 'interventionist' strategies identify power, recognising 'micro-processes of power' to "reveal the possibilities of resistance" (Newman, 2001, p. 160), and invite the reconsideration of text to identify new or suppressed meanings. Critics accuse post-structuralism of advocating nihilism or relativism but this is rare, as post-structuralists challenge the assumption that it is possible to separate what anything "is" outside of culture and history (Crowther, 2003, p. 35; Rose, 1984). Thus, post-structuralism employs provisionality, standpoint analysis, and 'strategic essentialism' to demonstrate and understand how different viewpoints radically alter what something philosophically "is". The following section considers the development of post-structuralism in accounting.

1 *The Development of Post-structuralism in Accounting*

Post-structuralist work within the accounting literature continues to develop incorporating Foucault, Derrida, Nietzsche, Heidegger, Baudrillard, and Laclau and Mouffe (Loft, 1986; Knights & Collison, 1987; Miller & O’Leary, 1987; 1993; 1994; 1998; Hopper *et al*, 1987; Hoskin & Macve, 1988; Arrington & Francis, 1989; 1993; Arrington & Puxty, 1991; Arrington & Schweiker, 1992; Francis, 1994; Gallhofer & Haslam, 2003; Arrington, 1997; Macintosh *et al*, 2000; Macintosh & Shearer, 2000; Arrington & Watkins, 2002; Watkins & Arrington, 2007; Hopper & Macintosh, 1993; Spence, 2007). In particular, as DT incorporates elements of Foucault (genealogy) and Derrida (deconstruction), relevant accounting work includes:

- a) Foucauldian research incorporates both archaeology (Hopwood, 1987; Hoskin & Macve, 1986, and Hoskin & Macve, 1988) and genealogy (Miller & O’Leary, 1987; Macintosh, 1994). Miller & O’Leary’s reconsideration of the history of the development of standard costing and budgeting is considered an exemplar of Foucauldian accounting research. Miller & O’Leary argue, genealogically, that the ‘origin’ of accounting can be traced through historical events such as:

the political objectives of states, historical contingency, particular national conditions, and the development of related disciplines (Miller & O’Leary, 1987, p. 238).

Of relevance is Loft’s (1986) study of the emergence of cost accounting in the UK, as it demonstrates how professional accounting associations helped to establish the management accounting discourse as accepted. Similarly, Hopwood’s (1987) study illustrated the ‘proactive’ role of accounting in shaping an organisation, which constitutes an important aspect of the empirics of this thesis; and

- b) Derrida’s deconstruction is a powerful tool due to the rhetorical process of accounting research (Arrington & Schweiker, 1992). In implementing Derrida’s deconstruction strategies, Arrington & Francis (1989) deconstruct Jensen’s (1983) attempt to found a PAT, employing ‘aporia’, hierarchal reversal, ‘differance’, and supplementarity (further work includes Macintosh, 2002; Devine *et al*, 2004; McKernan & Kosmal, 2007). Deconstruction challenges accounting ‘truth’ claims by highlighting the assumed nature of accounting knowledge and the ability to expose and highlight the effect of these assumptions on accounting

information. This strategy helps to examine how interested parties used ‘accounting’ (as a political signifier).⁸⁶

There is increasing recognition of post-structural insight within accounting, and the next section demonstrates the growing impact of post-structuralism on regulatory theory.

2 *Law: Post-structuralism and Regulation*

There are four reasons for the development of post-structural regulatory research:

- 1) Regulation is increasingly linked to democracy (Black, 2000b);
- 2) The discursive nature of regulation involves rhetorical and language analysis (Davies, 2002);
- 3) As the size of ‘civic society’ increases (as Western Governments roll-back the provision of State services and regulation) there are alternative regulatory pressures (such as decentred regulation) (see Black, 2002a; Morgan & Yeung, 2007); and
- 4) The collapse of the traditional public/private divide caused ‘power’ and ‘politics’ to become decentralised (Morgan & Yeung, 2007): e.g. the Government’s ‘responsible re-regulation’ policy increased the extent of regulatory communication.

Black (2002b) considers the complexity of the concept of regulation from a politico-legal perspective by acknowledging the politics of regulation. Regulation is a political and ideological concept, and hence it is often defined according to process or by function (Morgan & Yeung, 2007, p. 1):⁸⁷ e.g. Hood *et al* define regulation:

... any control system ... must by definition contain a minimum of the three components ... There must be some capacity for *standard-setting*, to allow a distinction to be made between more or less preferred states of the system. There must also be some capacity for *information-gathering* or monitoring to produce knowledge about current or changing states of the system. On top of that must be some capacity for *behaviour-modification* to change the state of the system (Hood *et al*, 2001, p. 23).

⁸⁶ See the discussion of deconstruction and genealogy and its relationship with hegemony in Chapter five, which argues that DT’s integrated reading helps in understanding the interface of law and accounting in telecommunications regulation, and the formation of antagonistic political identities.

⁸⁷ Chapter two illustrated that ‘public interest’ regulation tends to rely on administrative processes.

Regulation is a complicated concept: narrow definitions concentrate on State attempts to influence social behaviour; wide definitions argue that it is any form of social control imposed by the State or social institutions (Morgan & Yeung, 2007, p. 2). Black illustrates the complexity of 'regulation':

'Regulation' is not a concept that travels well, in either a centred or 'decentred' form. As any who have attempted to study 'regulation' outside of English-speaking countries will aware, there is often no parallel work or even concept, that that does not mean that the social activity to which the term 'regulation' is used to refer does not exist (Black, 2002b, p. 2).

Post-structural regulatory research compares centred with decentred regulation. Centred regulation has many forms (heavy-handed, State-driven regulation, State-based 'command and control' regulation, and less interventionist models that correct 'market failure'), "assum[ing] the State to have the capacity to command and control, to be the only commander and controller, and to be potentially effective in commanding and controlling" (Black, 2002b, p. 3). However, as Black explains, this traditional 'command and control' regulation is problematised as:

poorly targeted rules, rigidity, ossification, under- or over-enforcement, and unintended consequences ... Its failings are variously identified as including the following: that the instruments used (laws backed by sanctions) are inappropriate and unsophisticated (instrument failure), that government has insufficient knowledge to be able to identify the causes of problems, to design solutions that are appropriate, and to identify non-compliance (information and knowledge failure), that implementation of the regulation is inadequate (implementation failure), and that those being regulated are insufficiently inclined to comply, and those doing the regulating are insufficiently motivated to regulate in the public interest (motivation failure and capture theory) (Black, 2002b, pp. 2-3).

Critics argue that multiple sites of 'governance' challenge traditional State-based hierarchy and social organisations such as non-Governmental organisations extend beyond providing alternative spaces in civil society to fill a social and regulatory gap left by modern Western States withdrawing from social welfare services, impacting on the State's ability to sustain much-needed social services (Carter & Molisa, 2005, p. 8). Consequently, critics argue for the Foucauldian-influenced decentred regulation, which embraces a wider set of 'regulatory' techniques than the 'rules, sanctions'

approach of ‘command and control’ regulation (Black, 2002b; Roberts, 2005; Parker *et al*, 2004; and Morgan & Yeung, 2007). The premises of decentred regulation include:

- 1) Complexity: emphasis on causal complexity and the complexity of interactions between social actors. Regulation is intricate as “actors are diverse in their goals, intentions, purposes, norms, and powers” (Black, 2002b, p. 4).
- 2) Fragmentation of power, control, and knowledge: no actor has the information to solve all social problems within a regulated industry, as in an autopoietic sense, decision makers, regulators, and regulatees construct their environment in their own image, or “through their own cognitive frames”. This notion of power reflects Foucault’s governmentality.
- 3) Autonomy: actors will act and develop in the absence of government intervention. Foucault argues that as regulation is “the conduct of conduct”: a) regulation produces unintended outcomes; b) regulatory forms may have to vary depending on regulatee’s attitude towards compliance; c) no single actor dominates the regulatory process due to their limited knowledge and the autonomy of others; and d) “the autonomy of the actor will to an extent render it unsusceptible to external regulation” (Black, 2002b, p. 7).
- 4) Fragmentation and autonomy result in complex “interactions and interdependencies” between social actors and government (Black, 2002b, p. 7).
- 5) The collapse of the social-political public/private distinction means that governance may happen in the absence of formal legal structures and is broader and localised than under a centred model of regulation.

The increased decentred regulatory instruments move State hierarchy to ‘heterarchy’, where “the State does not have the monopoly of authority but shares it with other institutions and actors in the regulatory process (Bartle & Vass, 2007, p. 17). In NZ, examples of decentred regulation in telecommunications include informal consumer boycotts of Telecom, local consumer protests organised by the Te Horo Telecom Users’ Group and the Strath Taieri Community Board, social and environmental reporting, and alternative reporting awards for annual reports. Consequently, there is a developing field of post-regulatory theory invoking decentred and post-structural ideas (see, Teubner, 1986; 1987; Veld *et al*, 1991; Foucault, 1991; Rose & Miller, 1992; Teubner *et al*, 1994; Rhodes, 1997; Rose, 1999; 2000; Black,

2002a; 2002b; Braithwaite & Drahos, 2000; Parker, 2000; Morgan & Yeung, 2007). In particular, Black calls for increased discourse analysis of regulation to “facilitate a better understanding of regulatory processes” (2002a, p. 195). Black considers the main challenge to be methodological (2002a, p. 196), but this thesis proposes that the examination of discursive strategies in the institution and interpretation of the regulatory framework answers these methodological concerns.

In short, post-structural theory provides space to consider the complexity posed in this thesis. First, post-structural theory provides space to examine internal political events and an integrated, external political overview. Second, given the discursive focus, it examines the adversarial processes of cost construction in accounting at methodological, technical, and political levels (Chapter three), the adversarial nature of the political process in the construction, institution and implementation of new telecommunications regulation (Chapter two), and its ontological focus provides flexibility in order to conduct interdisciplinary research.

VI CONCLUSION

Traditional research paradigms do not provide the necessary theoretical framework to undertake this inter-disciplinary research. In considering and critiquing the parallel development of positivism, interpretivism, and critical theory in accounting and law, the chapter presented general limitations of the existing research paradigms.

Key conclusions include:

- PAT is related to legal contractarianism in the theoretical and methodological focus on explaining and predicting phenomena, the commitment to ‘value-free research’, and the incorporation of neo-classical economic bases (Chua, 1986, pp. 605-606).
- In accepting the status quo and structures, positivism is related to modernism.
- Positivism is not appropriate as the goal of this research is not to explain and predict outcomes, particularly by demonstrating the arbitrariness and

choice inherent within cost and the social construction of costing, accounting, regulation, and law.

- In interpretivism, subjects and objects socially construct meanings. Interpretivists seek to understand the 'historically-situated and culturally derived' interpretations of the social world. Interpretivist management accounting research understands the contextual implementation and effects of tools and techniques. In law, interpretivism constructs legal rights and duties to best justify communal political practices and focuses on what makes the law what it is.
- Interpretivism is not appropriate, as it is inherently conservative, cautions against the exercise of judgment, and it ignores the power of institutional structures.
- Critical theory in law and accounting challenges the existing state of affairs through unpacking restrictive conditions and demonstrating that objectivity and social norms are products of domination, ideology, politics and power. In particular, critical theorists illustrate the role of law and accounting in maintaining power relationships within society, and the discourse of law and accounting creates and sanctions conceptions of 'truth' to the detriment of others in society.
- Critical theory informs the thesis, but it is inappropriate as its politics of social change is problematic. The assumption that a single universal signifier leads to change overly simplifies the complexity of politics and tends to be dichotomous.
- Post-structural theory is an appropriate theoretical framework due to its focus on politics at the local and particular.
- Post-structuralist work within the accounting literature reflects the linguistic turn in accounting. In particular, Foucauldian research examined the capacity of accounting to shape social norms at discursive and organisational levels, while Derridean research challenged 'truth' claims within accounting.
- Legal research, particularly regulatory research, increasingly incorporated post-structural theory, particularly due to the discursive nature of the legal process, the increasing size of 'civic society', and challenges to the traditional public/private divide (Morgan & Yeung, 2007).

Chapter five builds on post-structuralism proposing that Laclau and Mouffe's post-Marxist DT provides a theoretical framework to analyse the political tensions over the incorporation of cost accounting as the central focus in telecommunications regulation.

- Chapter Five -

Discourse Theory

I CHAPTER FIVE OVERVIEW

Chapter four concluded that traditional paradigmatic research in law and accounting was inappropriate for this thesis as it failed to account for many interested parties, conflicting political motivations, and the interdisciplinary interface. The focus on the discursive construction of ‘cost’ and ‘regulation’ rejected positivism as it separates subjects from objects. The political historicity of telecommunications regulation and the conflictual nature of costing led to the rejection of interpretivism for its narrow focus on ‘what is’ and ‘judgment’. Critical theory was rejected due to the combination of the interdisciplinary focus, the lessons from Moore (1991), and personal discomfort with political interventions constructed on single universals. Although influenced by interpretivism and critical theory, Chapter four argued for post-structuralism to interrogate the interface of law and accounting in telecommunications regulation. Chapter five argues for the incorporation of Laclau and Mouffe’s post-structural, post-Marxist DT as its theoretical base (Laclau & Mouffe, 1987; 2001; Ross, 1988; Laclau, 1990; 1994a; 1994ba; 1996b; 2006; Norval, 1996; Torfing, 1999; Butler, Laclau & Zizek, 2000; Howarth, 2000; Howarth *et al*, 2000; Marsh & Stoker, 2000).⁸⁸

In introducing DT (with insight from Glynos & Howarth, 2007) the chapter develops four reasons for invoking DT:

- a) The complicated, multifaceted empirics require a flexible theoretical framework. DT re-energizes the political by looking internally within law, accounting, and regulation and examining the external effects of the political process. This provides resources to consider the phases of telecommunications re-regulation, including the regulatory genealogy, the regulatory institution of cost accounting, and the political strategies employed in regulatory interpretation and implementation. In illustration, Figure 5.1 depicts the messiness of the interconnected, political situation towards the end of the light-handed regulatory phase (the late 1990s). The signifier “light-handed regulation” captures regulatory issues in NZ

⁸⁸ Appendix 4 considers the limitations and critiques of DT.

including the *Telecom v Clear* litigation, Telecom’s dominance, limited CC resources, and the difficulty of litigation.

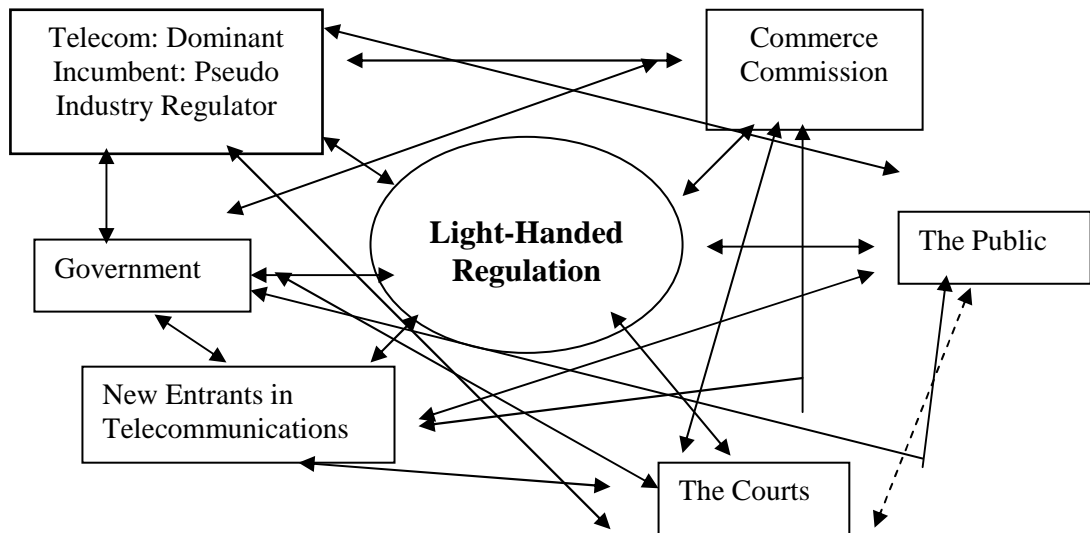


Fig 5.1: Problematism: Genealogical Accounts of Telecommunications Regulation

In response, the Labour-led Government legislated sector-specific regulation in telecommunications. Figure 5.2 illustrates the transition from light-handed regulation, through the introduction of cost-based regulation in the form of TSLRIC for interconnection access pricing and net costing for the TSO.

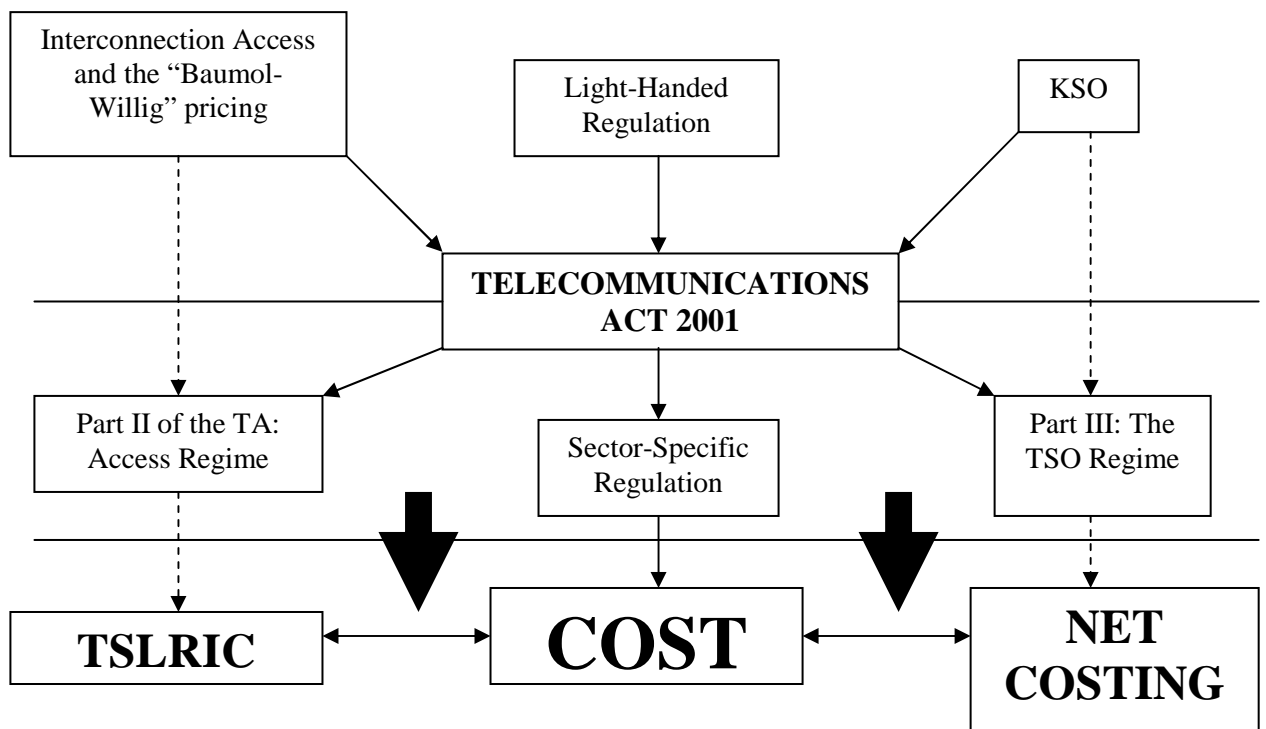


Fig 5.2 – Institution: Re-regulating telecommunications

The final empirical phase concentrates on the implementation of the TA, as depicted in Figure 5.3.

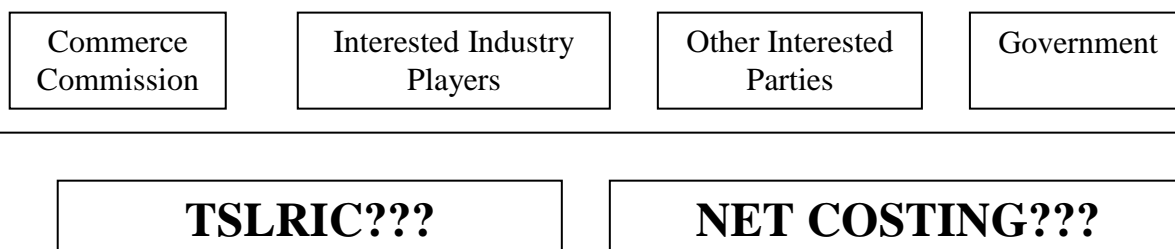


Fig 5.3 – Contestation: Implementing and Interpreting the new Telecommunications Act 2001

The empirical phases from problematisation to institution to contestation requires a two-part empirical analysis in Chapter seven: part one analyses the rhetorical arguments presented for and against the institution of TSLRIC and net costing by interested parties (see Table 2.2 which describes how TSLRIC and net costing are seen to ‘resolve’ NZ’s regulatory problems); part two examines the contestation over the meaning of TSLRIC and net costing as there was very little guidance as to the implementation and design of these cost concepts. Figure 5.3 depicts the interest in unpacking the meaning of the concepts.

Given the complex empirical environment, as depicted in Figures 5.1, 5.2, and 5.3, the DT theoretical framework provides the flexibility for a theorised reading of the re-regulation stages and an examination of the overall re-regulation. In particular, DT responds to the theoretical critiques developed in Chapters two, three, and four. Chapter two illustrated that no regulatory theory captured the complexity of NZ’s regulatory history: a good regulatory theory is interdisciplinary and considers the economic, historical, and political (Horwitz, 1989). DT’s flexibility in incorporating the economic, historical, political, and discursive insights provides a comprehensive regulatory account. Chapter three argued that cost accounting challenges the regulatory system given the role of accounting at technical, methodological, and political levels. DT’s integrated theoretical components including hegemony, condensation, overdetermination, and rhetoric identify, examine, and critique the political strategies employed in interpreting and implementing the cost-based regulation without being solely beholden to economic, historical, or political analysis (Horwitz, 1989).

- b) Disciplines are epistemologically bound and incommensurate (Hviding, 2003, p. 43) which poses methodological, epistemological, and ontological challenges for interdisciplinary research. Devenney acknowledges that all disciplines are “conservative”:

Disciplines police institutional boundaries in defining appropriate objects of study, in authorising methodological principles and in legitimising accredited subjects as their agents (Devenney, 2002, p. 176).

As DT is suspicious of the role of epistemology, the thesis does not consider epistemological peculiarities to disciplines like law, accounting, and politics (Hviding, 2003, p. 43). But by focusing on ontology and the ontic, DT moves through the bounded nature of epistemological, interdisciplinary inquiry (Hviding, 2003). DT operates at the ontic level

and its inter-relation with ontology: this chapter introduces the cornerstones of an ontology of negativity (Glynos, 1999, p. 3). As cost is the central regulatory device in the TA and cost has methodological, technical, and political implications, the political analysis shifts to the ontological as a way of interrogating the uses of cost in accounting, law, and regulation. The thesis concentrates on meanings: why was cost chosen for regulating telecommunications? What does cost-based regulation signify? How was discourse centred on the nodal point of 'cost'? How is cost rhetorically used in regulation?

b) Accounting, law, and regulation are discursive. The opportunity to examine the regulatory process (incorporating accounting, law, economics, public policy, and politics) from problematisation to institution to interpretation is a unique empirical site, particularly due to the call for the discursive analysis of regulatory processes.⁸⁹ The focus on the discursive construction of social practices, the scope for contestation, and the employment of rhetorical strategies enables fuller appreciation of the complexity of the social and political landscape of telecommunications regulation by providing space to examine multiple actors, political strategies, and goals. Other critical interventions, such as Marxist critiques, would tend to exclude community members from the struggle as universal signifiers create opposition and are dichotomous. DT's political regulatory picture is comprehensive and complex.

d) Finally, 'politics' exists:

Post-structuralism ... is immanently political. This is because [post-structuralism] challenges the discourses and theoretical coordinates through which we normally approach politics, thus allowing new political meanings and practices to be conceived ... We can say, then, that a post-structuralist approach to politics points always to a certain void that makes social and political identities indeterminate (Newman, 2005, pp. 153-154).

The political is always implicated, as "some sort of shadowy underside of politics" (Devenney, 2002, p. 176). Mouffe comments:

By 'the political' I refer to the dimension of antagonism that is inherent in human relations, antagonism that can take many forms and emerge in different types of social relations. 'Politics', on the other side, indicates the ensemble of practices, discourses and institutions which seeks to establish a certain order and organise human co-existence in conditions that are affected by the dimension of 'the political' (Mouffe, 2000, p. 101).

Law, accounting, and regulation are political, and this thesis unpacks the political interface of law and accounting as conceived by telecommunications regulation.

⁸⁹ There have been calls for the articulation of DT in law, accounting and regulation, as DT politicises that which is considered traditionally non-political. In particular, Laclau acknowledges the importance of articulating DT to accounting (Gallhofer & Haslam, 2003, p. xi), and Black has argued for increased discursive analysis of regulation to facilitate better understandings (2002, p. 195).

DT research in law and accounting tends to examine macro-political issues, like critiques of justice, rights, and disciplinary foundations (Mitchell *et al* 1998; Hines, 1988; 1989; 1991; Morgan, 1988; Perelman, 1963; Coombe & Cohen, 1999; Coombe, 1998; Goodrich, 1993; Taibi, 1992; Wicke, 1991; and Butler *et al*, 2000). This thesis articulates DT by examining the interface of law and accounting at meso- and micro-levels focusing on the everyday use of accounting concepts like cost in shaping telecommunications regulation.⁹⁰ Given that “post-structuralism constructs social realities by exploring the issues of ‘micro-politics of power’” (Wickramasinghe & Alawattage, 2007, p. 482, Kosmala & Herbach, 2007; Fogarty, 1996; and Thomas & Davies, 2005), this thesis investigates the formation of political identities characterised by antagonism and uncertainty at numerous levels, including the discursive enunciation of standpoints and perspectives by actors, and then, moves to consider the political strategies at the level of reception post the enactment of legislation analysing the contestation over interpreting and implementing the regulation.

DT is a political democratic theory grounded in post-analytical philosophy, post-structuralism, and psychoanalysis that theorises the ‘drawing together’ of complex, disparate groups in the ‘name’ of a political goal. DT incorporates various theoretical developments in an interconnected political structure, and this chapter introduces these constituent elements, highlighting their relevance for interrogating the interface of law and accounting.

II LACLAU AND MOUFFE’S THEORY OF DISCOURSE AND POLITICS

It is our social nature to try to close and reify structures. However, Laclau and Mouffe challenge the systematicity of structures based on the ontological assumption that subjects and objects are open and never fully constituted, thus there is a failure to

⁹⁰ This differs to Preston & Vesey (2008) who hold that law finally decided the shape of US utility accounting.

completely close structure due to the limits of language and structuralism. In understanding this core DT component, the theoretical components of the critique of the ‘systematicity’ of systems follow.

A Deconstructing the Systematicity of Systems

Structure is a central tenet of Laclau and Mouffe’s analysis of the social world. DT does not deny structure and systems.⁹¹ However, DT does question structuralist tendencies to hold systems as self-evident and complete, arguing that structures are inexorably open despite the human ‘need’ to tendentially close systems for fixity. Laclau argues that there must be something outside to define what is inside a system (Laclau & Mouffe, 2001, p. 125). The social structure, e.g. ‘family’ is commonly understood as the elements Mother-Father-Brother-Sister. However, while the elements represent the ‘family’ structure, the label ‘family’ is not within but external to the system. Thus, if an external meaning defines the ‘system’, the ‘system’ is not a ‘system’ in a closed sense. This external element makes the ‘system’ possible (illustrating potential limits) and it makes the ‘system’ impossible (it is impossible to close the ‘system’ due to the external ‘other’). Chapter three’s critique of economic costing and the critique of the arbitrariness of positivism, TCE, and agency theory illustrate this challenge. The positivist focuses on the cost of production to the exclusion of the costs of exchange and agency. To exist, Laclau and Mouffe argue the positivist cost structure requires external elements of the costs of exchange and agency to exist. This critique of the systematicity of structures provides the core to the DT intervention. There are six main points:

- 1) As meaning within a system requires an external element this demonstrates the limits of the system. In seeking to close a system, this is temporary and artificial for the external element is both within and outside of the system (Laclau & Mouffe, 2001, p. 125). Thus, in regulating a

⁹¹ Epstein’s characterisation of DT as denying structure misreads the theoretical framework (Epstein, 1998, Torfing, 2005).

TSRLIC interconnection access regime, the original failure to regulate interconnection constituted a limit of the light-handed regulatory regime.

- 2) External elements are antagonistic and provide identity to the system (Laclau, 2001, pp. 8-10). Structural linguistics holds that elements within systems constitute a system of pure differences. However, Figure 5.4 illustrates that as the external element antagonises and provides identity, there is no longer a system of pure differences, as the antagonistic element subverts identity (Laclau & Mouffe, 2001, p. 125). In understanding the costs of production, the costs of labour, materials, and overheads constitute 'cost'. However, economics recognises different components of cost excluded by focusing on the cost of production, including the costs of agency and exchange. As these are external to the costs of production, they are antagonistic, but they aid in identifying cost, and consequently are incorporated into the system of costs. The system of costs, though, is open, as there may be other elements of cost not represented within the system. Thus, the system is now a system of difference and equivalence: internal elements possess their external opposition in common. In simple terms, the antagonistic elements of different aspects of cost (production, exchange, agency) are all present within each specific type of cost (positivism, TCE, and agency), and there are other external elements of cost (such as politics or the social, organisational and institutional construction of meaning), which continue to antagonise the elements within the system rendering the system 'open'.

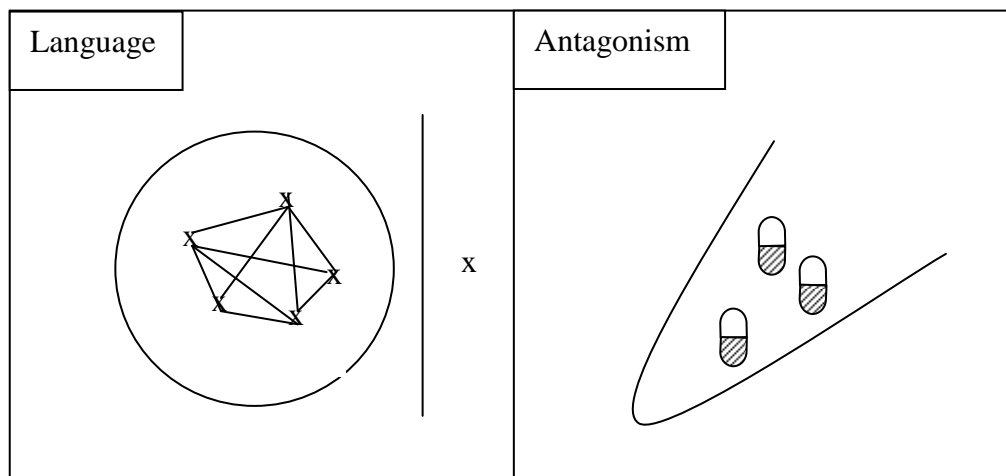


Fig 5.4: External elements constitute antagonism to structures

Laclau and Mouffe explain:

But if ... the social only exists as a partial effort for constructing society – that is, an objective and closed system of differences – antagonism, as a witness of the impossibility of final suture, is the 'experience' of the limit of the social. Strictly speaking, antagonisms are not internal but external to society; or rather, they constitute the limits of society, the latter's impossibility of fully constituting itself (Laclau & Mouffe, 2001, p. 125).

- 3) The production of antagonism creates relations of equivalence (Laclau & Mouffe, 2001, p. 128). As any social formation can develop equivalence there is no *a priori* communitarian identity but rather any sense of community is built on a system of equivalences. Figure 5.5 illustrates the

production of equivalence: antagonisms result in actors in the social space trying to incorporate antagonisms in a form of hegemonic politics. As more social groups attach significance to the antagonism it becomes increasingly empty of particular meaning: e.g. legal concepts like justice, human rights, ethics, and the public interest (as critiqued in Chapter three) ‘allow’ each social group to have their own ‘take’ on the concept. In particular, social groups understand the public interest as the ‘public good’, ‘public welfare’, ‘general interest’, ‘common interest’, as the democratic majority, as an administrative function, or as captured by the regulated. Collectively, each of these articulations makes it more difficult to grasp what is meant by the term to the point that it arguably is an empty signifier.

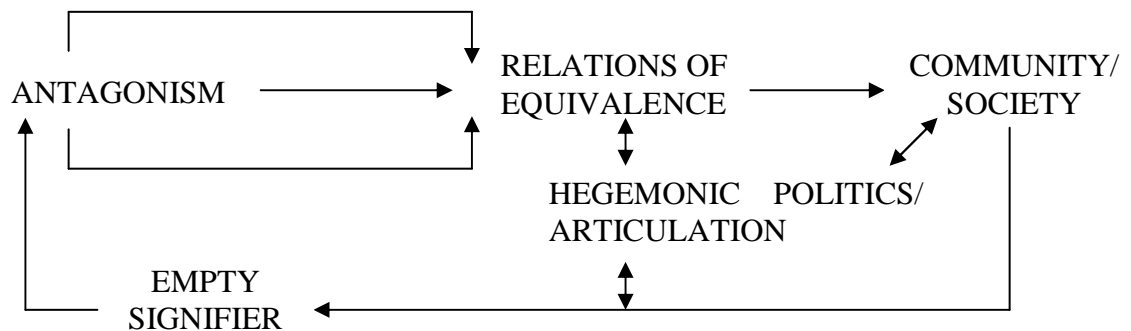


Fig 5.5: The production of antagonism creates relations of equivalence

Laclau and Mouffe state:

... certain discursive forms, through equivalence, annul all possibility of the object and give a real existence to negativity as such ... As the social is penetrated by negativity – this is, by antagonism – it does not attain the status of transparency, of full presence, and the objectivity of its identities is permanently subjective ... the impossible relation between objectivity and negativity has become constitutive of the social (Laclau & Mouffe, 2001, pp. 128-129).

- 4) Social order is contingent and ‘menaced’ by its dislocation and antagonism, as antagonisms name the lack (Laclau, 1996a, p. 53). In an effort to dispel the antagonism, internal signifiers to a system attempt to ‘name’ the antagonism, and that signifier begins to signify that which is lacking within the entire system. Consequently, the signifier no longer names a particular of the system, but it is an ‘empty signifier’, empty of any specific content. It is thus detached from the system and names the antagonism (that which threatens the formation of the system). In terms of economic cost, then, the costs of exchange name the lack within the costs of production, and TSLRIC and net costing represent the lack within light-handed regulation for telecommunications.
- 5) The empty signifier names the absent fullness of any society or community, as that present within a community are equivalences and differences, but what is absent is that which is common to every identity. Empty signifiers are necessary for any society as they provides the basis for social objectivity (Howarth *et al*, 2000, p. 9). Laclau argues:

Politics is possible because the constitutive impossibility of society can only represent itself through the production of empty signifiers (Laclau, 1996a, p. 53).

Consequently, legal concepts like ‘justice’ or ‘human rights’ and an accounting concept like ‘substance over form’ may be empty signifiers. These concepts exist in an ontic sense, as each individual can read a particular meaning into the signifier: i.e. ‘justice’ means to treat like cases similar, but this is developed by demonstrating how each case is or is not similar, rather than having a specific meaning.

- 6) This is tied to Gramsci’s hegemony, as a hegemonic element names the lack within a system. Thus, hegemony (the lack) demonstrates the limits of the system providing the system with identity (Laclau, 1996a, pp. 90-92). For DT, the theory of hegemony is built on the necessity of both antagonism and equivalences. Antagonism names the societal lack, defining the political frontier (Laclau & Mouffe, 2001, p. 125), while identifying and naming of equivalences leads to the system naming the antagonism (Laclau & Mouffe, 2001, p. 128). Although, Gramsci’s notion of “wars of position” had the ultimate goal of incorporating as many particulars into the social space as is possible, Gramsci presents hegemony as static (Howarth *et al*, 2000, p. 15). Laclau and Mouffe argue that given the fluidity of antagonisms and equivalences, the political frontier must logically be capable of movement and social actors must be able to take various positions. Consequently, hegemony is a flexible concept.

However, a truly ‘empty signifier’ is probably only possible in theory, as practically, there are remnants of meaning within any claimed ‘signifier’ and particulars will attempt to define the ‘empty signifier’ for their own purposes. For politics, as the signifier is not purely empty there is always the possibility of a ‘newer’, ‘better’ antagonism ‘more accurately’ defining the lack.

In DT, hegemony is the process of drawing equivalent ‘signifiers’ together to increase the chains of equivalence. The following discussion considers the central concept of equivalence:

- i) The more extended a chain of equivalence, the less ‘pure’ content is attached to the empty signifier: e.g. consider a movement against imperialism, with the theoretical possibility of all social actors being incorporated into the chains of equivalence. For an anti-imperialistic movement to allow chains of equivalence to reach all social actors, then the anti-imperialism movement must be devoid of any ‘particular’ meaning as some social actors support imperialism. At this extreme level, it would seem that the system would be closed as the empty signifier includes all particulars (the equivalent of the whole or the universal). Thus, the logic of equivalence allows movement between the end of extreme particularity and absolute universalism (Laclau & Mouffe, 2001, p. 127). Equally, cost is a relatively simple concept when confined to the costs of production, but with the addition of the cost of agency and exchange, the concept becomes ‘more’ open. Then, in creating ‘chains of

equivalence' to the notions of cost developed in the interpretive and critical theory sections, this incorporates subjectivity, politics, consensus, conflict, and the social and institutional creation of meanings of cost into the signifying system. The meaning of cost becomes less clear the more and more extended becomes the chain of equivalence.

- ii) The more extended the chain of equivalence the less pure are particular demands (as each struggle is totally enclosed within itself). The movement of the frontier changes the definition of the enemy, and consequently, this leads to different actors being incorporated into the hegemonic movement (Laclau & Mouffe, 2001, p. 127). As an example, consider the process of submissions to the MIT. If the MIT received only one submission, it is likely that this submission would be understood and well represented within the final report. However, the more submissions received, the less likely it is that all submissions are fully understood and represented within the final report, despite the final report being accorded with the status of summarising and representing the entire submission process.
- ii) With hegemony, the empty signifier is contextual and changes, and it moves with changes in political frontiers. There is no *a priori* empty signifier. However, in what may seem contradictory, DT asserts the necessity of an empty signifier; the necessity for both difference (antagonism) and equivalence (Howarth *et al*, 2000, p. 9; Laclau, 1996a, p. 38). So, where does the empty signifier come from? One particular takes the position and articulates the empty signifier for the remainder of particulars. However, to name the lack and develop a political function, the articulating particular needs to shed its core aim (Laclau, 1996a, p. 39). If a 'particular' signifier of an environmental group occupies the position of empty signifier, e.g. it needs to reduce its particular environmental identity as much as possible, operating as an incarnation of society's lack *per se*. Marx's description of communism illustrates that communism was not a particular that was part of society but rather it was the incarnation of precisely the lack in society (Marx & Engels, 2002, pp.50-51). Thus, the history of hegemonic struggles between and within groups is the history of the negotiation of their identity and the struggle for the articulation of the lack (Laclau & Mouffe, 2001, p. 125). The empty signifier constitutes what is lacking in society, involving relations of power, representation, and politics.

Core Empirical Concept: Floating/Empty Signifier: a signifier that attempts to name the lack in a social system. It is a signifier that attempts to empty itself of particular content, so that various particular contents can be read into the signifier.

- iv) In relation to power, DT assumes unevenness within the social, presupposing dominance at the counter-hegemonic level. Thus, the negotiation of the lack between particulars is not a fair or even process, but power does not negate the articulation of the lack. It still requires negotiation between the demands of the particular, and one particular taking the articulating position by diminishing their own particular demands to define the lack. The moment of articulation is a moment of

power and consensus. This is the nodal point of a hegemonic movement, and is the product of the social forces (Howarth *et al*, 2000, p. 8).

- v) Representation is key to the hegemonic process as there is constant negotiation between the heterogeneous ‘particulars’ and the representative element. This is the place of rhetoric (Laclau, 1996a, p. 97). The lack in society is catachresissical by naming the unnameable:⁹² e.g. sector specific regulation is presented as correcting the failures of the light-handed regulation, or more specifically, TSLRIC and net costing name the ‘lack’ of the light-handed regime by providing ‘solutions’ to the perceived problems of a lack of a dedicated interconnection access regime and the KSOs distortion of interconnection prices.

This discussion has introduced the central components of the critique of the ‘systematicity’ of structures, the logic of equivalence, and ‘hegemony’. For DT, the theory of hegemony provides the theoretical justification for the ‘universal’. Between the particular and universal there is polarity, as one does not supersede the other. In DT, ‘universals’ are politically produced: Figure 5.6 demonstrates that for the creation of a universal, one of a set of particulars must take on a universal task (which is incommensurable to the particular), representing the absent fullness of society and resulting in antagonism (Laclau, 1996a, pp. 34-35): e.g. in considering the ‘best’ approach to interconnection, Chapter three discussed various pricing options including ‘bill and keep’, revenue sharing, wholesaling, or cost-based pricing mechanisms. In the ensuing debate, TSLRIC emerged as the preferred regulatory approach, and consequently, took on the universal task of representing the failure of interconnection under the light-handed system. However, in the act of representing the ‘universal’, this ‘TSLRIC’ particular creates antagonisms precisely due to its failure to fully constitute the failure of the light-handed approach.

⁹² The logic of hegemony invokes the historicity of the ‘universal’ and the ‘particular’: In ancient philosophy, the universal (the form) was more important than the particular (a corruption of the universal). The universal was necessary and rational, as the particular was an irrational simplification (Laclau, 1996a, p. 22). In medieval philosophy, the particular related to knowledge, placing the universal, the unknowable, in an eschatological narrative: God was universal; man was particular. For Laclau, this resulted in a Eurocentric view of the world with the privileging of the agent in history and incarnation, the Enlightenment, and the equivalence of religion with civilisation (1996a, p. 23). Modernity replaced God with reason, with thought equating with universalism. Incarnation was discarded, as was the incommensurability of the particular to the universal. For example, Marx’s ‘particular’ concept of the working class has, within itself, the universal roots of human emancipation (Laclau, 1996a, pp. 24-25).

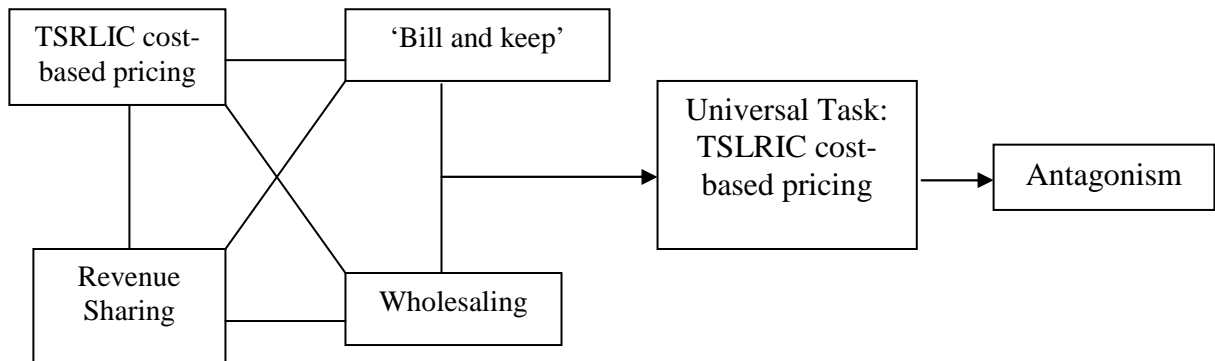
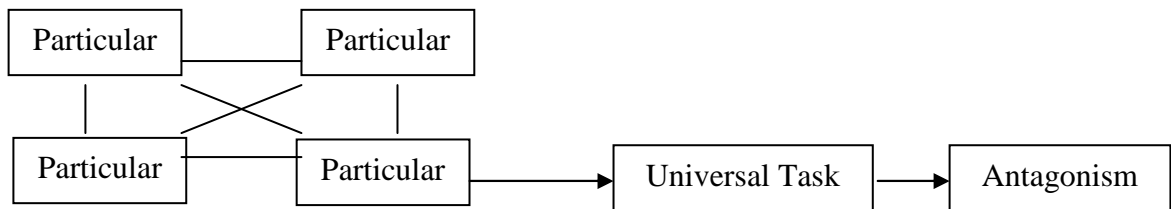


Fig 5.6: The relation of the universal and the particular

Consequently, there is no *a priori* universal, but rather a series of particulars, one of which, in a contingent act, takes the place of the universal. However, in taking the universal ‘place’ it is impossible to erase the traces of the ‘particular’ (Laclau, 2001, p. 11).⁹³ Therefore, despite presenting the ‘universals’ of the *Telecom v Clear* case and the Baumol-Willig pricing rule as ‘representing’ the failure of light-handed regulation, Telecom’s dominance, litigation difficulties, Telecom’s sale, and the KSO (amongst others) ‘contaminate’ the signifier as alternative reasons for the failure of the light-handed approach. The *Telecom v Clear* failure represents a ‘particular’ problem within light-handed regulation, as it is impossible to erase the ‘particular’ meaning in its role as a ‘universal’ signifier. Consequently, as universals are contextual, temporary and partial, this explains why there are no natural universals in DT.

Furthermore, hegemony relies upon a notion of metaphorical displacement and metonymy: i.e. the rhetorical element of DT requires tropological logic: in order for rhetoric to be possible logic must cross the figural. Freud argued that it is never possible to have a pure literal signifier or a pure literal signified: DT holds that within one

⁹³ This differs to Kantian transcendentalism, as there is no transcendental intervention.

signifier there are several potential signifieds. By crossing logic (a one-to-one relational meaning) with the figural, the figural meaning holds that the connection between two terms is metaphorical or catachresical. Lacan's notion of metonymy is a notion of pure continuity, in that it is a method for saying less than what you need to say, the process of displacing meaning, such as 'sailboat to ship' and 'pint of beer to pint'. In a similar manner, this is the process of 'cost' within positivism representing only the 'costs of production'. Although one hegemonic message may represent several constitutive particulars, within the hegemonic message there is the constant presence of all tropes (possibilities). This is metaphorical displacement. However, hegemony does not privilege metaphor or metonymy, as it is not a logic of pure continuity or pure metaphor (it is not about erasing differences), but rather it is about creation and the political. For Laclau and Mouffe, catachresis is the process of naming the unnameable, and thus, an empty signifier is always catachresical in representing absent fullness (hegemony). However, any representation for the absent fullness is metaphorical. For DT, then, metonymy, metaphor, and catachresis are representative and constitutive of the openness of society.

However, the core question remains: How does DT develop our understanding of the interface of law and accounting characterised by the use of accounting information in the regulation of telecommunications? DT is heterodoxical due to the pluralistic strands of theory read for a particular purpose. As a methodological articulation, Chapter six introduces Glynos and Howarth's logics of critical explanation (2007) premised on five ontological DT assumptions: i) social objects are meaningfully constructed; ii) social objectivity is contingent, relational, and contextual, iii) discursive exteriors partially constitute and potentially subvert; iv) identity is articulatory, and v) dislocation is an internal element to social totalities. In the following sections, existing DT research in law and accounting is examined by illustrating each ontological

assumption,⁹⁴ how each step develops existing accounting and legal research, and how these assumptions are appropriate for this thesis. The next section develops an understanding of the first ontological assumption, which relates to DT's concept of discourse. For DT, all social arrangement and organisation is meaningful, based on a reading of social constructionism.

B Assumption One: Objects and Practices are Discursively Constructed

DT investigates the way in which discourses constitute social reality so that “[t]he discursive can be defined as a theoretical horizon within which the being of objects is constituted. In other words, *all* objects are objects of discourse, as their meaning depends upon a social constructed system of rules and significant differences” (Howarth *et al*, 2000, p. 3). This is an explicit rejection of the positivist subject-object duality. Laclau and Mouffe explain:

This totality which includes within itself the linguistic and the non-linguistic, is what we call *discourse*, but what must be clear from the start is that *by discourse we do not mean a combination of speech and writing, but rather that speech and writing are themselves but internal components of discursive totalities ...* Every social configuration is meaningful ... it establishes a system of relations with other objects, and these relations are not given by the mere referential materiality of the objects, but are, rather, socially constructed. The systematic set of relations is what we call discourse (Laclau and Mouffe, 1987, p. 82) [emphasis in original].

Howarth *et al* emphasise the centrality of discourse:

At this lower level of abstraction, discourses are concrete systems of social relations and practices that are intrinsically *political*, as their formation is an act of radical institution, which involves the construction of antagonisms and the drawing of political frontiers between ‘insiders’ and ‘outsiders’. In addition, therefore, they always involve the exercise of *power*, as their constitution involves the exclusion of certain possibilities and a consequent structuring of the relations

⁹⁴ There is a developing accounting literature incorporating DT (Mouck, 1995; Macintosh & Shearer, 2000; Gallhofer & Haslam, 2003; Lehman & Okcabol, 2005; Everett, 2003; Solomon & Darby, 2005). Gallhofer and Haslam's (2003) *Accounting and Emancipation* provides a comprehensive account of DT and accounting. In the acknowledgements, Gallhofer and Haslam note Laclau's interest in the articulation of DT to accounting (Gallhofer & Haslam, 2003, p. xi). Equally, there are many studies in both law and accounting that consider the constituent elements of DT (For law, see Barenberg, 1994; Bartlett, 1990; Bender, 1993; Boyle, 1985; Brewer, 1988; Brosnan, 1987; Carlson, 1999; Cummings & Eagly, 2001; Feldman, 1991; Fink, 2004; Jacob, 1995; Litowitz, 2000; Moore, 1989; Mootz, 1993; 1998; Rubinfeld, 1989; Scallen, 1995; Weisberg, 1986; Wetlaufer, 1990; and Zlotnick, 2001. For accounting, see Birkin, 1996; 2000; Boland Jr, 1996; Boyce, 2002; 2004; Cooper, 1995; Jönsson & Macintosh, 1997; McPhail, 1999; Macintosh, 2004; Mattessich, 2003; Neu & Taylor, 1996; Neu & Simmons, 1996; Neu, Cooper & Everett, 2001; Sotto, 1997; and Unerman & Bennett, 2004). Consequently, there is considerable literature providing a foundation upon which to construct a DT intervention into the interface of law and accounting.

between different social agents. Moreover, discourses are *contingent* and *historical* constructions, which are always vulnerable to political forces excluded in their production, as well as the dislocatory effects of events beyond their control (Howarth *et al*, 2000, pp. 3-4).

However, this does not reduce everything to discourse or deny the existence of the world:

The fact that every object is constituted as an object of discourse has *nothing to do* with whether there is a world external to thought, or with the realism/idealism opposition. An earthquake or the falling of a brick is an event that certainly exists, in the sense that it occurs here and now, independently of my will. But whether their specificity as objects is constructed in terms of ‘natural phenomena’ or ‘expressions of the wrath of God’, depends upon the structuring of a discursive field. What is denied is not that objects exist externally to thought, but rather different assertions that they could constitute themselves as objects outside of any discursive conditions of emergence (Laclau & Mouffe, 2001, p. 108).

Thus, as law, accounting, and regulation exist as social structures the discursive focus of DT moves past their reified status to unpack the discursive construction of the disciplines: they exist as objects due to the discursive structure. Although similar to the interpretivist and critical theory critique of positivism (Arrington & Francis, 1989; Arrington & Schweiker, 1992; Shearer & Arrington, 1993; Tinker, 1988), DT develops this by examining the contingent and relational nature of social meanings, structures, and practices through dislocation, disruption, and change within social structures, practices, and meanings.

There is emergent critical discourse analysis research in accounting (Arrington & Francis, 1989; 1993; Arrington & Schweiker, 1992; Gallhofer, Haslam, & Roper, 2001; Hines, 1988; 1989; Lehman, 1992; Lehman & Tinker, 1987; McCloskey, 1985; 1990; Mouck, 1992; Nelson, 1993; Okcabol & Tinker, 1990; Reiter, 1998; Shearer & Arrington, 1993; Tinker, 1988; and Williams, 1989). However, by theorising an inclusive ‘discourse’ where all social configurations are meaningful and discursively constructed, DT develops existing literature:

- a) Consider Fairclough’s critical discourse analysis, which defines “discourse – language use in speech in writing – as a form of “social practice” (1995, p. 258; in accounting, Gallhofer, Haslam & Roper, 2001; Owen, Swift, & Hunt 2001; in law, Silverstein & Urban, 1996; Pether,

1999). DT challenges the narrowness of Fairclough's definition of discourse, as the sophisticated linguistic focus on speech and writing is a limited aspect of discourse and ignores the broader social context. The under-theorised social theory limits the scope of the discursive inquiry and increases the likelihood that the researcher is caught in the problem of the double hermeneutic.

- b) Consider discourse within archaeology, where Foucault institutes a series of strategies through which to understand discursive structures (in accounting, Hopwood, 1987; Chapman, Hopwood & Shields, 2006; in law, Hunt & Wickham, 1994; Beck, 1996). In particular, Foucault talks of formation rules covering objects, subjects, concepts, and strategies within the archive (2003, p. 409). These rules operate as a judgment mechanism for the truth/falsity of serious speech acts: to make a serious speech act, the statement must conform to the rules. Foucault argues "... a proposition must fulfil complex and heavy requirements to be able to belong to the grouping of a discipline, before it can be called true or false" (1970, p. 60). But Foucault fails to account for changes in the archives, as it fails to account for speech acts that fall outside the rules. Within the archive, there is no theorisation of external speech acts, but logically Foucault requires the external as he expects archives to shift over time, given genealogy. Thus, Foucault's discursive is unclear. DT critiques Foucault's discourse as artificial by providing a comprehensive approach to discourse including both the linguistic and non-linguistic, as well as theorising interventions and alternatives. In particular, the act of instituting social discourse creates 'insiders' and 'outsiders' and is historically and materially contingent (Howarth *et al*, 2000, pp. 3-4).

Consequently, the theorised, discursive intervention into the social world within DT develops accounting and law by not artificially drawing boundaries around the discursive and the extra-discursive (Fairclough) and by theorising the constitutive outside of discourse (Foucault).

How is 'discourse' relevant to the empirical analysis?

In the empirical analysis, the discursive examination moves beyond the 'linguistic' presentation of 'cost' to examine broader political strategies employed at the first level by interested parties in the MIT and then to examine at the second level the rhetorical strategies employed in implementing and interpreting the TA 2001. Further, DT theorises changes in social conditions, enabling us to theorise and examine the changes in social conditions from pre-TA, to the institution of the TA, to the enactment of the TA.

The subsequent section argues that social meanings are contextual, relational, and contingent by examining structural linguistics and rhetoric. DT's approach to discourse and politics challenges structural linguistics by depicting the logical impossibility of

closing structures through introducing concepts of ‘insiders’, ‘outsiders’, and the constitutive outside. This post-structural critique suggests that rhetorical analysis is important in DT by arguing that the external element that names structures is metaphorical and politically, rhetoric is ontological, particularly in relation to metonyms.

C Assumption Two: Social meanings are contextual, relational, and contingent

In articulating the challenge to structural linguistics and the dual role of rhetoric (both metaphorically and metonymically) in DT, the political nature of social meanings are contextual, relational, and contingent.⁹⁵

1 The Challenge to Structural Linguistics

For de Saussure, language is an anti-representationist, structural system, independent from the world:

But what is language? ... It is both a social product of the faculty of speech and a collection of necessary conventions that have been adopted by a social body to permit individuals to exercise that faculty (de Saussure, 1959, p. 9).

Figure 5.7 depicts the key component of language: the ‘sign’ constituting the signified and the signifier (de Saussure, 1959, p. 66).

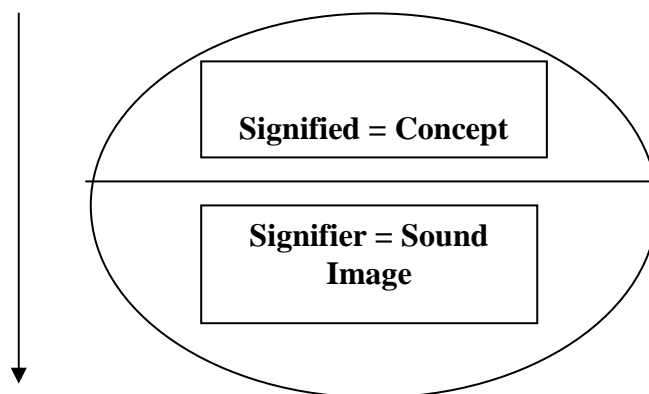


Fig 5.7: De Saussure's sign

⁹⁵ Structural linguistics in accounting focused on the identification of the unique symbols and rules of accounting. In particular, Belkaoui noted that particular accounting symbols identified accounting concepts: certain numbers and words, like ‘debits’ and ‘credits’ are accepted symbols with special accounting significance. Equally, there are grammatical rules which formalise the structure of the accounting language, particularly in relation to the construction and dissemination of accounting data (see Belkaoui, 1978; Belkaoui 1995).

De Saussure deduces three assumptions about structural language:

- 1) The sign is arbitrary: “[t]he bond between the signifier and the signified is arbitrary ... *the linguistic sign is arbitrary*” (de Saussure, 1959, p. 67). There is arbitrariness to the signified, as words change meaning (concept) over time: e.g. “wicked” formerly meant evilness while more recently “wicked” means cool. There is arbitrariness at the level of the signifier, as nothing ‘attaches’ the word (the letters) to the concept itself. Languages developing different sound images to explain a similar concept illustrates the lack of a natural connection between concepts and sound images: examples include the English “brother”, the French “frère”; the English “water”, the French “eau”. For de Saussure arbitrariness means “it is unmotivated ... in that it actually has no natural connection with the signified” (1959, p. 69).
- 2) Language is form, not substance:

Language can also be compared with a sheet of paper: thought is the front and the sound the back; one cannot cut the front without cutting the back at the same time; likewise in language, one can neither divide sound from thought nor thought from sound ... Linguistics then works in the borderland where the elements of sound and thought combine; *their combination produces a form, not a substance* (de Saussure, 1959, p. 113).

Structural linguists hold that language is all about form, where the composite sign represents a closed system of meaning.

- 3) Language is a system of differences. De Saussure argues that “[l]anguage is a system of interdependent terms in which the value of each term results solely from the simultaneous presence of the others ...” (de Saussure, 1959, p. 114). Thus:

... in language there are only differences. Even more important: ... in language there are only differences *without positive terms* (de Saussure, 1959, p. 120).

This is central to DT, as meaning is relational. In order to comprehend a sign, individuals must comprehend the relational differences. To understand the sign ‘mother’, I need to understand the relation of ‘father’. Wittgenstein argued that a term’s intelligibility is wholly defined by the totality of its differences (1983; Staten, 1984). Accounting is prime example of the relations of difference in language: the very manner in which accounting is taught instructs this presentation. One of the core accounting devices is the accounting equation: Assets = Liabilities + Equity. This is all about relations of difference: to understand what assets are, individuals need to understand what they are not, which includes Liabilities and Equity.

To develop a theory of politics, DT problematizes de Saussure’s structural linguistics:

- a) Structuralism presupposes that to have structure (such as language), it is necessary to have limits to the structure. Post-structuralism focuses on challenging the limits of a system: e.g. for social and political ‘order’, it is differentiated to something external such as ‘disorder’. DT holds that in order to claim the existence of a ‘system’, it needs to be differentiated from what it is not. However, as this is an infinite process, one cannot incorporate all meanings into a system:

The critique of structuralism involved a break with this view of a fully constituted structural space; but as it also rejected any return to a conception of unities whose demarcation was given, like a nomenclature, by its reference to an object, the resulting conception was of a relational space unable to constitute itself as such – of a field dominated by the desire for a structure that was always fully absent. The sign is the name of a split, of an impossible suture between signified and signifier (Laclau & Mouffe, 2001, p. 113).

By definition, a system is always totality less one, as that ‘one’ illustrates what the system is not (Miller, 1991, p. 17). Consequently, post-structuralism critiques structural linguistics for the logical impossibility of closing structure and for the need to have something external to identify a structure. As discussed earlier, the positivist focus on the costs of production excludes costs of exchange and agency, but the existence of these elements threatens the structure of positivist cost.

- b) Lacan challenges de Saussure’s presentation of sign by challenging the self-enclosed presentation of the sign and the subservient nature of the signifier (1989, pp. 126-160). The main political motivation for this shift is in identifying the subject and subjectivity. Lacan reverses de Saussure’s sign arguing that it should signal the domination of the signifier over the signified, as represented in Figure 5.8:

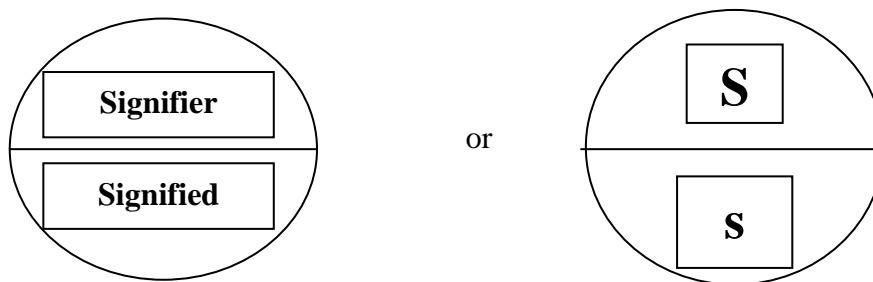


Fig 5.8: Lacan’s challenge – domination of the signifier over the signified

In psychoanalysis, Lacan’s reversal of the sign aids the search for subjectivity in that the sign is representative of an impure meaning explained by the presence of the signifiers (Lacan, 1989, p. 139).⁹⁶

⁹⁶ Lacan argued that language and symbolic, cultural elements play a core role in the formation of the sense of self. For Lacan, this is the ego. Thus, he ties a reformed version of de Saussure’s sign to subjectivity. If language was a system of differences, where meaning is negatively construed, by understanding what it is not in relation to what it is, then the ‘sign’ represents that ‘thing’ by standing in its place. The sign is not the thing itself. For Lacan, what the sign attempts to represent the signified, is always displaced. Thus, for Lacan, this affected the subject as well: like the displacement within language, the subject is never complete, as they shift from one signifier to the next, unable to fully articulate the signified. In tying subjectivity to language, this presents the view that the subject is the subject of the process of signification, in that through the order of signs, symbols, representations and images, the individual is formed as a subject (Lacan, 1988).

Laclau and Mouffe argue that meaning is constructed through signifiers:

- i) Society is an open structure: individuals accept society's existence, but it is not possible to identify society. This is similar to profit in accounting: profit is a constructed, intangible object; profit is accepted as existing, but it is not identifiable.
- ii) Lacanian psychoanalysis demonstrates the possibility for multiple significations and meanings, as dominated by the signifier, but equally it enables the attachment of multiple signifieds to a central or master signifier, as depicted in figure 5.9:

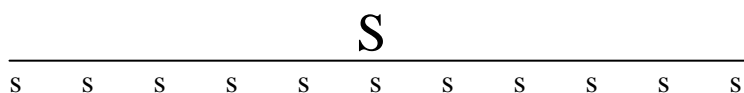


Fig 5.9: Multiple signifieds attached to a master signifier

Figure 5.6 enables Laclau and Mouffe to describe the empty signifier as a central component of hegemonic politics. An empty signifier is where so many particular signifieds are attached to a signifier that it has no particular meaning and represents all particulars. The simple question, “what is cost?” illustrates this. The different nature of cost within positivism, interpretivism, and critical theory all represent particular signifieds attached to the master signifier ‘cost’. Equally, there are contrasting disciplinary depictions of cost: economic, political, social, and accounting.

- iii) By human nature, social beings seek to close the structure of society for sanctity and safety, but this is both possible and impossible as it is necessary to always have something external to society in order to close the ‘system’: thus, society is always open:

... in discourse theory the social field can never be closed, and political practices attempt to ‘fill’ this lack of closure. As Laclau puts it, “although the fullness and universality of society is unachievable, its need does not disappear: it will always show itself through the presence of its absence”. In other words, even if the full closure of the social is not realisable in any actual society, the idea of closure and fullness still functions as an (impossible) ideal (Howarth *et al*, 2000, p. 8).

In DT, the gap between the necessary and the impossible is politics, that social space where social actors struggle to attempt to close the system.⁹⁷ Cost is an open concept, but to render the concept usable social actors will try to provide a closed definition to cost. Thus, social actors do not dwell on the inherent arbitrariness and openness within cost (as ‘cost’ attempts to represent something ‘real’).

⁹⁷ Also, note Holdcroft (1991). This introduces the axis of language in relation to de Saussure’s structural linguistics. That is, language is a combination of the paradigmatic (or associative) or syntagmatic. DT uses this axis of language to argue that the syntagmatic element comprises the relations of difference, while the paradigmatic elements comprise the relations of equivalence, which constitute a vital component of political hegemony.

DT's critique of structural linguistics is the genesis for a theory of politics as the inexorably open nature of structures provokes a political struggle to close the open system. But always an element of openness remains. Thus, social meanings are contextual, relational, and contingent.

The recognition of the linguistic turn in accounting and law is the first step for DT. The linguistic turn moves past the 'factual', 'objective' presentation of law and accounting to see the products of accounting and law, the figures, numbers, reports, judgments, and statements as texts, with accountants and lawyers as the authors of the text, auditors and judges as critics, and users as readers (Macintosh, 2000, p. 23; Davies, 2002). While the realist turn in law suggested this approach, this was a significant shift from the traditional accounting focus on accounting as information, as required by economics. Here, accounting is a narrative (Macintosh, 2002, p. 23). The post-structuralist critique concentrates on understanding how language and language games work to produce meaning (rather than the structural linguistic concentration on the reflection of meaning). Thus, both the languages of law and accounting are challenged: accounting does not 'reflect' economic reality, but accounting is actively producing meaning; law does not 'reflect' justice and the rule of law, but law is actively engaged in constructing this meaning (this is the subject of increased discussion in accounting and law, see Macintosh *et al*, 2000, Macintosh, 2002; Arnold, Hammond & Oakes, 1994; Goodrich, 1987; Davies, 2002). The critique demonstrates that legal and accounting constructs like justice and cost are not neutral or objective constructs, "representing reality as is" (Morgan, 1988, p. 478), which challenges the incorporation of cost accounting into telecommunications regulation. Although developed as a critique of linguistics, Laclau and Mouffe shift the focus to society, as a post-structural theorisation of politics in society, given the open nature of social systems. The political motivation, human nature, is to close these open systems.

Equally, the Lacanian intervention drives the failure of language to the failure of the subject, in that subjects are unable to achieve closure in attempts to identify their subjectivity.

How is the ‘challenge to structural linguistics’ relevant to the empirical analysis?

In contesting the ‘shape’ and in implementing the new regulatory framework, we analyse the struggle to achieve social closure through the processes of law, accounting, and regulation. In particular, we examine how social actors struggle to ‘identify’ with the new regulatory mechanisms. This analysis exposes the contingency of the political process (in the arbitrariness and openness of the disciplines and cost more specifically), but also exposes the contingency of the subject, as subjects seek to identify with the new regulatory system. Consequently, we see a political struggle to achieve closure.

However, the following section examines the central political role for rhetoric. The struggle to close systems is a rhetorical task.

2 *Rhetoric*

Rhetoric operates politically constitutively and ontologically, drawing on a philosophical tradition including Aristotle, Cicero, Quintilian, and Nietzsche. Nietzsche acknowledged the fundamental role of rhetoric in constructing ‘knowledge’:

What therefore is truth? A mobile army of metaphors, metonymies, anthropomorphisms: in short a sum of human relations which became poetically and rhetorically intensified, metamorphosed, adorned and after long usage seem to a nation fixed, canonic and binding; truths are illusions of which one has forgotten that they are illusions; worn-out metaphors which have become powerless to affect the senses; coins which have their obverse effaced and now are no longer of account as coins but merely as metal.

...

Only by forgetting that primitive world of metaphors, only by the congelation and coagulation of an original mass of similes and precepts pouring forth as a fiery liquid out of the primal faculty of human fancy, only by the invincible faith, that *this* sun, *this* window, *this* table is a truth in itself: in short only by the fact that man forgets himself as subject, and what is more as an *artistically creating* subject: only by all this does he live with some repose, safety and consequence (Nietzsche, 1964, pp. 180, 184).

For Aristotle, rhetoric permeated all thought (1947), as philosophy metaphorically makes the unfamiliar familiar. Quintilian’s examination of metaphor argues for two forms:

- a) The transfer of meaning through one word to another (metaphor); and

- b) The attachment of meaning with one word to another where there is no appropriate word (catachresis).

Quintilian argued the existence of catachresis indicated that language is empirically poorer than the world's richness, as it calls upon us to name that which society does not know. The rhetorical lack between the limits of language and the object/thing illustrates the impossibility of language to name everything: consider energy source names: Watt, Doethgan, and Bohr. Laclau and Mouffe argue that modernity marginalised the rhetorical tradition by concentrating on the Platonic philosophy concerned with truth and reality (Laclau & Mouffe, 2001). However, the social need for language and communication accepts the existence of rhetoric. For Laclau and Mouffe, rhetoric ontologically justifies the social lack.

Rhetorical tools are important in constituting social meaning and politics. Metaphor, (from the Greek, *metaphora*) 'a figure of speech where one thing is used to designate another, thus making an implicit comparison', represents the transfer of quality. Metonymy (from the Greek, *metanoma* and the Latin *pars pro toto*) is the use of a single characteristic to identify a more complex entity in the substitution of one word for another with which it is associated. NZ examples include that the "Beehive" is a metonym for Parliament and "Crown" is a metonym for the monarchy. Metonymy works by contiguity rather than similarity: the presentation of food on a dish results in referring to food as a 'dish'. However, the rhetorical distinction between metaphor and metonymy is important. In metonymy, there is no transfer of quality: there is nothing dish-like about food. Rather, metonymy invokes a domain of usage and an array of associations, while metaphor picks a set of meanings, transferring them to a new domain of usage (Laclau, 2001, p. 8). Catachresis is the incorrect or improper use of a word. Table 5.1 demonstrates forms of catachresis, illustrating how each example violates language norms:

Table 5.1: Examples and Forms of Catachresis

Form of catachresis	Example
a) Using a word to denote something radically different from its normal meaning.	“‘Tis deepest winter in Lord Timon’s purse” from Shakespeare, <i>Timon of Athens</i>
b) Using a word to denote something for which, without the catachresis, there is no actual name.	“a table’s leg”
c) Using a word out of context.	“Can’t you hear that? Are you blind?”
d) Using paradoxical or contradictory logic.	Creating an illogical mixed metaphor. Eg. “To take arms against a sea of troubles...” – Shakespeare, <i>Hamlet</i>

Laclau and Mouffe argue that catachresis illustrates the lack within the structure of language. When faced with a situation when there is no ‘name’ (the impossible), the gap is filled by whatever resource is available (the possible): this is the function of politics (Laclau & Mouffe, 2001, p. 127).

Thus, rhetoric operates ontologically as hegemonic interventions represent metonyms by which a “particular group takes up demands articulated by contiguous groups ... or extends one set of demands into adjacent spheres” (Howarth & Griggs, 2005, p. 11); it operates politically, as attempts to temporarily close systems are metaphorical involving the “creation of meaningful totalities via the disarticulation and replacement of previously existing formation” (Howarth & Griggs, 2005, p. 11). Social meanings are contextual, relational and contingent as the ‘temporary’ closure of systems indicates the impossibility of permanently closing systems.

There is a strong rhetorical tradition in law and accounting (Arrington & Schweiker, 1992; Arrington & Francis, 1993; Hines, 1988; 1991; 1996; MacCormack, 2005; Frug, 1992; Mertz, 2007). However, much of the focus of rhetorical analysis is at the epistemological level (Johnson, 1995; Quattrone, 2000; Arrington, 2004) explaining ‘how’ accounting constructs, persuades and silences. DT, in the Heideggerian fashion, argues that the focus should ontologically and ontically be on meaning. Rhetorical

analysis focuses on strategies employed, meanings attributed, and explanations, developing existing literature through focusing on the political in a shift away from structural law-like generalisations and elements. The post-structural focus is on the role of rhetoric in driving social interaction and change. As Mouck (1995) explains “post-structuralist social theory, accordingly, can be seen as a powerful tool for attacking the reductionistic and deterministic perspectives associated with neoclassical economics and economic accounting theory” (p. 78).

How is ‘rhetoric’ relevant to the empirical analysis?

Text of documents and interviews are subject to rhetorical analysis where the role of metonyms and metaphors operate at the ontical level, focusing on the employment of cost in telecommunications regulation. The focus is on how the ontological dimension informs the employment and use of tropes in the analysis of discourse, examining the substitution of metaphors, as a means of understanding the logic by which interested parties struggled to ‘create’ and ‘operationalise’ a workable framework, given the incentives of the various players to ‘use’ the system for their own advantage.

Philosophically, rhetoric refers to the lack as understood through the Heideggarian-informed ‘negative ontology’.

3 *A Note on the Implications of the Negative Ontology*

DT holds that signifying structures are irreducibly open, due to the lack. This requires a particular perspective on ontology: the ‘negative ontology’, premised on negation and impossibility. DT develops Heidegger’s concept of the ontic (1962).⁹⁸ Although ‘ontic’ and ‘ontology’ share the same Greek root (‘being’) they represent two concepts (Bhaskar, 1987). Ontology is the philosophy of Being as discussed by classical scholars such as Parmenides, Plato, and Aristotle. Heidegger’s different conception of ontology concentrates on the meaning of ‘being’: “Dasein”. The ‘ontic’ describes physical or factual existence, as opposed to the nature or properties of that being. This philosophical turn allows Heidegger to differentiate between the ontic as an adjective

⁹⁸ Heidegger presupposed an ontological significance that distinguishes ontological being from mere “thinghood” of an ontic being. This is where the notion of *Dasein* arises, as a being that is capable of ontology, that is, recursively comprehending properties of the very fact of its own Being.

referring to “real being” and ontology, which attempts to distill essences or structures from Being. For DT, ontic meaning is crucial. Ontological analysis presupposes the ontic explicitly analysing the moments of ontic existence, and for DT, this is where ontic moments acquire (or are attributed) meaning: ontic existence requires explanation, not expansion or combination. As there are infinite differences and different points of view, it is impossible to have a complete description of Being. Rather, in order to have a point of view, there needs to be another position. In summary, DT is concerned with meanings, operating at the ontic level and the analysis of objects as specified by ontological presuppositions.

In developing the relationship between ‘discourse’, the openness of social systems, and rhetoric, Laclau and Mouffe shift focus to the construction of politics through hegemony, deconstruction, and genealogy. In particular, when a metaphor claims to ‘name’ the gap in an open system, this is hegemonic. However, any ‘name’ representing the ‘lack’ creates another ‘name’ excluded from the signifying system. Thus, a hegemonic metaphor partially constitutes and partially subverts itself. The next section develops the post-Marxist influences of DT. Laclau and Mouffe take Luxemburg and Gramsci’s work on hegemony, and intertwined with rhetorical logic, develop an account of politics. This section notes the link to deconstruction and genealogy. This reading of Marxism requires Laclau and Mouffe to challenge the traditional economic determinism and class reductionism inherent in Marxist theory.

D Assumption Three: Discursive Exteriors that Partially Constitute also Potentially Subvert

DT is post-Marxist, recognising the contingency, arbitrariness and limitations of Marxist theory⁹⁹ in terms of class reductionism (through critiquing Luxemburg) and

⁹⁹ Laclau and Mouffe argue that this movement in the history of Marxism is a movement from class essentialism to discourse tracing the political philosophy of the classical Marxism right through to Gramsci (Laclau & Mouffe, 1987, pp. 98-99).

economic determinism (through critiquing Gramsci) (Laclau & Mouffe, 1987, pp. 98-99). Laclau and Mouffe argue that class is less useful for analysing contemporary society pointing empirically to the development of ‘new social movements’ including sexuality (queer movements), ethnic, religious, national identities, and unions (1987, p. 97). Yanarella argues that Laclau and Mouffe rework Gramsci’s ideological hegemony to provide a post-Marxist view of hegemonic articulation which incorporates a deconstructive logic of extravagance with a post-structuralist reading of Althusser’s logic of overdetermination (1993, p. 69). Consequently, Laclau and Mouffe’s critique of Marxism targets the ontological privileging of the working class as the agent of historical transformation, representing an unacceptable ‘essentialism’: ‘class’ identifies with a particular agent while identifying with the ‘universal’ of human emancipation, such that the particular of ‘class’ possesses the roots of universality. Thus, Laclau and Mouffe critique Marx’s conception of the working class as a “social identity” through challenging the Marxist understanding of economic processes:

To assert . . . that hegemony must always correspond to a fundamental economic class is not merely to reaffirm determination in the last instance by the economy; it is also to predicate that, insofar as the economy constitutes an insurmountable limit to society’s potential for hegemonic recomposition, the constitutive logic of the economic space is not itself hegemonic (Yanarella, 1993, p. 69).

Thus, the post-Marxist movement in DT thematises hegemonic politics informed by unfixity, the deferral of social identity, and excesses in symbolic articulation (Yanarella, 1993, p. 69), as discussed in the following section.

1 Hegemony

Hegemony is the central concept in Gramsci’s work (1971, pp. 55-56), and for DT, hegemony is democracy (Laclau, 2001, p. 7). It is “dialectic” rather than “deterministic” as hegemony attempts to recognise the interdependence and the autonomy of hegemony, culture, and ideology (Fraser & Bartky, 1992, p. 175). Hegemony is ‘the discursive face of power’:

It is the power to establish the ‘common sense’ or ‘doxa’ of a society, the fund of self-evident descriptions of social reality that normally go without saying. This includes the power to establish authoritative definitions of social situations and social needs, the power to define the universe of legitimate disagreement, and the power to shape the political agenda (Fraser & Bartky, 1992, p. 179).

Although Gramscian hegemony refers to rule by consent through moral and intellectual authority or leadership, groups can form alternative viewpoints in opposition. In Gramsci’s Italy, e.g. there was tension between the industrialists and the peasantry, referring to the ‘hegemony of the proletariat’ as counter to the dominant hegemony (Gramsci, 1926). This ‘hegemony of the proletariat’ is defined as the “social basis of the proletarian dictatorship and of the workers’ State”:

... the proletariat can become the leading and the dominant class to the extent that it succeeds in creating a system of class alliances which allows it to mobilize the majority of the working population against Capitalism and the bourgeois State ... this means to the extent that it succeeds in gaining the consent of the broad peasant masses ... (Gramsci, 1971, p. 443).

Counter-hegemonies have a certain degree of power in their ability to ‘influence’ the dominant hegemony. Gramsci recognised that a multitude of diverse counter-hegemonies are less successful in influencing the State through ‘divide and rule’. For the working class to achieve hegemony it needs to build a ‘network’ of ‘alliances’ with other social minorities. These new coalitions should respect the movement’s autonomy so that each group contributes to the development of a strong counter-hegemonic movement.

For Gramsci, the organic intellectual is central to developing counter-hegemonies: ‘organic’ as they are free from the pervasiveness of the dominant hegemony. Organic intellectuals help to develop the consciousness of capitalist contradictions and its pervasiveness in everyday life, operating as a type of strategist by problematising the dominant hegemony and aiding the development and direction of the counter-hegemony.

Hegemony is a contingent process of readjustment and re-negotiation, as dominant groups attempt to accommodate counter-hegemonic concerns by amending the dominant hegemony. Thus, the constitution of hegemony is inherently flexible, capable of taking many forms and positions to counter threats. Gramsci notes that accommodation results in a more complete dominant hegemony in quashing threats posed by counter-hegemonic movements.

However, an 'organic crisis' may develop where the dominant group begins to disintegrate creating an opportunity for a lesser class to 'break the shackles' of its class limitations and build a strong counter-hegemonic movement capable of challenging the existing order and replacing the previous hegemony. The key to 'revolutionary' social change in modern societies does not depend, as predicted by Marx, on the spontaneous awakening of critical class consciousness but upon the prior formation of alliances of interests, an alternative hegemony, with a developed, cohesive worldview of its own (Williams, 1992, p. 27).

2 *Developing Gramscian Theory*

Although Gramsci attempts to remove Marxist economic determinism from the theory of hegemony, Gramsci invokes class essentialism by limiting the revolutionary counter-hegemonic capacity to the 'working class' (Laclau & Mouffe, 2001, pp. 65-71).

Laclau and Mouffe, argue:

... We will thus retain from the Gramscian view the logic of articulation and the political centrality of the frontier effects, but we will eliminate the assumption of a single political space as the *necessary* framework for those phenomena to arise. We will therefore speak of *democratic* struggles where these imply a plurality of political spaces, and of *popular* struggles where certain discourses *tendentially* construct the division of a single political space in two opposed fields. But it is clear that the fundamental concept is that of 'democratic struggle', and that popular struggles are merely specific conjunctures resulting from the multiplication of equivalence effects among the democratic struggles.

... we have moved away from two key aspects of Gramsci's thought: (a) his insistence that hegemonic subjects are necessarily constituted on the plane of fundamental classes; and (b) his postulate that, with the exception of interregna constituted by organic crises, every social formation structures itself around a

single hegemonic centre ... these are the two last elements of essentialism remaining in Gramscian thought (Laclau & Mouffe, 2001, pp. 137-138).

In DT terms, hegemonic practices are an exemplary form of political activity that involves the articulation of different identities and subjectivities into a common project. This radicalises Gramscian hegemony:

Thus, hegemonic practices presuppose a social field criss-crossed by antagonisms, and the presence of elements that can be articulated by opposed political projects. The major aim of hegemonic projects is to construct and stabilise the *nodal points* that form the basis of concrete social orders by articulating as many available elements – floating signifiers – as possible (Howarth *et al*, 2000, p. 15).

Hegemony, then, is the central concept of DT.¹⁰⁰ A hegemonic signifier constructs those inside and those outside: it names that which partially constitutes and potentially subverts. For DT, hegemony possesses the following political conditions:

- 1) The unevenness of power is constitutive of it: power and freedom are correlative;¹⁰¹

¹⁰⁰ Hegemony and deconstruction are different sides of the same coin (Laclau, 1993; 1996a; Laclau & Mouffe, 2001). For Derrida, there is always something lacking, something always outside (Derrida, 1978a, pp. 351-370), and this is expressed in two ways: a) that which recognises and makes visible its legislating force; and b) that which conceals its legislating force under objective and natural sciences, such as structural linguistics (Derrida, 1992; Derrida, 1995; Derrida 1997a; Derrida, 1997b). Derrida claims that deconstruction recognises, identifies, and makes visible the concealed legislating forces:

Derrida generalises the concept of discourse in a sense coincident with that of our text ... 'The substitute does not substitute itself for anything which has somehow existed before it, henceforth, it was necessary to begin thinking that there was no centre, that the centre could not be thought in the form of a present-being, that the centre had no natural site, that it was not a fixed locus but a function, a sort of non-locus in which an infinite number of sign-substitutions came into play. This was the moment when language invaded the universal problematic, the moment when, in the absence of a centre or origin, everything became discourse – provided we can agree on this word – that is to say, a system in which the central signified, the original or transcendental signified, is never absolutely present outside a system of differences. The absence of the transcendental signified extends the domain and the play of signification indefinitely' (Laclau & Mouffe, 2001, p. 112, quoting Derrida, 1978a, p. 280).

Derrida provides DT with important theoretical and analytical tools for the analysis and development of politics (Phillips & Jorgensen, 2002; Howarth and Torfing, 2005).

¹⁰¹ DT develops this notion of power from Foucault's genealogy. Laclau and Mouffe are critical of the artificial distinction of Foucault's archaeology, referring to the duality in the rigidity of the discursive and the non-discursive (Stäheli, 2004, p. 232), but Laclau and Mouffe incorporate Foucault's genealogy to develop a complex notion of power (Laclau & Mouffe, 2001, p. 107, see Derrida, 1978a; 1992). For Foucault's genealogy, power is unavoidable and always present, based on domination, as opposed to liberal conceptions of power that concentrate on structural definitions of power such as the State and the judiciary. Foucault concentrates on identifying alternatives to dominant discourses, distinguishing 'origin' from 'emergence'. Genealogy concerns itself with the moment of emergence, rather than History's focus on origins. With genealogy, any order is contingent, and politically, we seek to identify the emergent from non-realised possibilities. Thus, genealogical inquiry focuses on examining what made the emergence of a particular discursive formation possible at the expense of, or concealing, other different possibilities. Foucault's

- 2) The dichotomy between universality and particularity is superseded;
- 3) Hegemonic politics is the production of a tendentially empty signifier that maintains the incommensurability of the universal to the particular. However, it does enable the particular to 'represent' the universal.
- 4) Generalisation of representation as a condition of the constitution of a social order.

Core Empirical Concept: Hegemony: this is a form of politics where a particularity articulates the 'floating signifier' for various disparate social groups, taking on an (impossible) universality which is incommensurable with the particular. Hegemony, then, is the central concept of DT. A hegemonic signifier constructs those inside and those outside: it names that which partially constitutes and potentially subverts. This radicalises Gramsci's hegemony, and relates to empty signifiers.

In developing Black's (2002b) problematisation of regulatory communication, hegemony, deconstruction, and genealogy reveal regulatory power struggles over interpreting and implementing regulation. In particular, the framework provides space to consider the political games from the regulated and regulator perspective. In particular, DT challenges law's claim to 'justice' by unpacking the assumptions underpinning the term. For DT, justice constitutes a universal 'empty signifier' applied to particular situations. However, how does one apply a universal rule to individual particular cases? Justice refers to the right to be just in treating alike cases in a similar manner. However, to operate the rule, there are two further specifications not evident in the rule: what is it to be 'similar'? How should they be treated?

Gramscian accounting research is increasing with twenty-three articles since 1990: five articles comprehensively articulate Gramscian theory (Gallhofer and Haslam, 2005; Ferguson *et al*, 2005; Catchpowle *et al*, 2004; Spence, 2007; Alawattage and Wickramasinghe, 2006). Catchpowle *et al* identify the central role of accounting in the process of capitalism determining the relationship between the capitalist, labour and

genealogy reclaims the position of an ontology of difference (tropological difference) or catachresis (naming the nameless). This is an emancipatory politics, in the sense of naming that outside of the system. DT takes the genealogical ontology of difference and conceives that an ethos requiring that structures are irreducibly open requires an ontology of lack (Glynos, 1999).

social activity, as well as how accounting plays a ‘mediatory’ role between the State and capital. In relation to human capital accounting is employed as a disciplining tool encouraging “quantity and abstraction” and “competitive accumulation” (Catchpowle *et al*, 2004, p. 1055). Spence, from a DT approach, examines the radical and emancipatory intent internal to the social accounting project. The paper acknowledges the role of business in shifting the hegemonic focus away from inquiry and critique. For Spence, emancipatory social accounting operates to actively expose the contradictions of current hegemony. This suggests that:

hegemony is politics ... We cannot stand outside of hegemony or power, nor should we want to. A radical political project can be constructed through antagonism and the hegemonic construction of the ‘movement’ or the ‘people’ as a historical actor. It is a countervailing power that is needed, but not a counter-hegemonic one (Spence, 2007, p. 12).

Consequently, accounting literature is increasingly embracing the DT approach to hegemony.

Equally, hegemony is used in law: Litowitz is critical of Gramsci for suggesting that there is a single ‘hegemony’ to law, arguing for the adoption of Laclau and Mouffe:

there are hegemonies: parts of law that are more fundamental and unquestioned, parts which are becoming challenged, parts which authorize the dominant culture, parts which offer liberation to the subordinate. Law ... incorporates contradictory discourses about equality, justice, and persons (Litowitz., 2000, p. 530; Mattei, 2003; Rajagopal, 2003).

Kennedy constructs a picture of “liberal hegemony in law schools” by drawing on the examples of denial of tenure to CLS scholars at Harvard, Yale, and Minnesota Law School (Kennedy, 1983; 1998). The clashes between critical and liberal legal theorists escalated to the extent that Harvard was labelled “the Beirut of legal education” (Austin, 1998, p. 2). However, the discursive focus of this thesis invites rhetorical, hegemonic, genealogical, and deconstructive analysis to examine the strategies, effects, and aims of the regulation, industry players, Government, lawyers, accountants, and the use of cost accounting information in the regulatory process. This thesis develops hegemonic literature by linking the hegemonic project to deconstruction and genealogy.

How is ‘hegemony’ relevant to the empirical analysis?

In relation to the rhetorical analysis, hegemony is the process by which interested parties draw together. In relation to TSLRIC and net costing, we see disparate groups with common understandings join together. In particular, we see how TSLRIC and net costing become representative of the failures of light-handed regulation. Equally, though, in analysing the interpretation and implementation of the Act, we reveal regulatory power struggles over the regulation.

While the combination of rhetoric, hegemony, deconstruction, and genealogy account for why there is a need to ‘fill’ the lack in social systems, the core political question remains: how do political actors articulate that ‘thing’ which ‘fills’ the social lack? This is a subtle, important movement from traditional political analysis in accounting by tying the role of structures to the role of subjects in articulating and invoking politics. Laclau and Mouffe’s analysis focuses on politics by examining the process of articulating the ‘social’ lack. To examine ‘articulation’, DT introduces condensation and overdetermination to explain the political effects of the rhetorical tools of metaphor and metonyms.

E Assumption Four: Articulatory Practice

Laclau and Mouffe introduce the psychoanalytic in their development of a political framework. In relation to politics, DT recognises the role of the subject. If social structures are open, and are only tendentially closed, the social actors themselves, are open, and seek to tendentially close their identity. This draws on the Lacanian subjectivity developed above, tying subjectivity to language. Lacan presents the view that the subject is the subject of the process of signification: through the order of signs, symbols, representations and images, the individual is formed as a subject (Lacan, 1988). For DT, there is a subjective link between the metaphoric and metonymic processes of articulating hegemonies, Freud’s conceptualisation of condensation and displacement, and Althusser’s development of overdetermination. In the construction of nodal points, condensation operates metaphorically by making the dissimilar similar,

while displacement (overdetermination) operates metonymically by concealing the primary identity of that ‘dissimilar’.

1 *Overdetermination/Representation/Condensation*

The main focus of Freud’s psychoanalytic inquiry was the unconscious escapism evident in dreams, jokes, and errors mediated through condensation and displacement. Condensation refers to creation at the manifest level (dream content) and is the equivalent of metaphor relating to the process of convergence, synthesis, construction, and fixation that leads to signification at the manifest level of some or many things at the latent level (dream thoughts). Displacement refers to condensation at both the manifest level and the latent level of the dream, and is the equivalent of metonymy. For Freud, there is displacement at the level of the conscious and the unconscious, as well as between events at the latent and the manifest levels.

Freud explains the ‘Dream of the Botanical Monograph’:¹⁰²

Thus ‘botanical’ was a regular nodal point in the dream ... the elements ‘botanical’ and ‘monograph’ found their way into the content of the dream because they possessed copious contacts with the majority of the dream-thoughts, because, that is to say it, they constituted ‘nodal points’ upon which a great number of the dream-thoughts converged, and because they had several meanings in connection with the interpretation of the dream. The explanation of this fundamental fact can also be put in another way: each of the elements of the dream’s content turns out to have been ‘overdetermined’ - to have been represented in the dream-thoughts many times over (Freud, 1900, pp. 388-389).

Freud continues:

Among the thoughts that analysis brings to light are many which are relatively remote from the kernel of the dream and which look like artificial interpolations made for some particular purpose. That purpose is easy to divine. It is precisely they that constitute a connection, often a forced and far-fixed one, between the dream-content in the dream-thoughts; and if these elements were weeded out of the analysis the result would often be that the component parts of the dream-content would be left not only without overdetermination but without any satisfactory determination at all.

...

If that is so, a transference and displacement of psychical intensities occurs in the process of dream-formation, and it is as a result of these that the difference between the text of the dream-content and that of the dream-thoughts comes about.

¹⁰² The content of the dream is as follows: “*I had written a monograph on an (unspecified) genus of plant. The book lay before me and I was at the moment turning over a folded coloured plate. Bound up in the copy there was a dried specimen of the plant*” (Freud, 1900, p. 386).

The process which we are here presuming is nothing less than the essential portion of the dream-work; and it deserves to be described as 'dream-displacement' (Freud, 1900, pp. 416-417).

Core Empirical Concept: Condensation: the fusing together of different elements to temporarily halt the development of competing significations. It is this 'temporary' nature that illustrates that the particularities of signifiers (their diversity) still contaminate the condensed signifier.

Core Empirical Concept: Displacement: no identity is pure and uncontaminated, as meanings and identities incorporate traces of other identities. This logic shows the relational character of the social, and demonstrates the difficulty of identifying 'the' meaning or identity attached to a concept.

DT employs two elements: nodal points and overdetermination. The nodal point refers to the point of condensation, where the existence of signification at the manifest level represents multifarious latent connections. In DT, the more open the point of condensation, the greater the number attached to signification. Overdetermination refers to the representation of a signified many times over, to the point where it is not possible to identify the primary source for meaning. Nodal points and overdetermination are vital to politics as political discourse is the articulation of nodal points representative of a multiplicity of heterogeneous factors, akin to the metaphor in rhetorical philosophy. In politics, the aim is to construct nodal points that make the dissimilar similar. For Laclau, this illustrates the limitations of representation:

The conditions for a perfect representation, would be met, it seems, when the representation is a direct process of transmission of the will of the represented, when the act of representation is totally transparent in relation to that will. This presupposes that the will is fully constituted and that the role of the representative is exhausted in its function of intermediation

...

So, the idea of having a perfect representation involves logical impossibility ... The problem, rather, is that representation is the name of an undecidable game that organises a variety of social relations but whose operations cannot be fixed in a rationally graspable and ultimately univocal mechanism ... As a result, the need to 'fill in the gaps' is no longer a 'supplement' to be added to a basic area of constitution of the identity of the agent but, instead, becomes a *primary* terrain. The constitutive role of representation in the formation of the will, which was partly concealed in more stable societies, now becomes fully visible (Laclau, 1996a, pp. 97, 98-99).

For DT, this relates to Althusser's overdetermination. Laclau and Mouffe argue that overdetermination relates to the constitution of the social as a symbolic order: "Society and social agents lack any essence and the regularities merely consist of the relative and the curious forms of fixation which accompany the establishment of a certain order" (Laclau & Mouffe, 2001, p. 98). Politically, then, nodal points (condensation) make the dissimilar similar (like metaphor), while overdetermination (displacement) conceals the primary identity of that 'dissimilar' (like metonym).

Core Empirical Concept: Overdetermination: Like metonyms, overdetermination works through displacement to conceal the primary identity of the dissimilar. In some ways, overdetermination unpacks nodal points.

How are 'condensation', 'displacement' and 'overdetermination' relevant to the empirical analysis?

Condensation is the process by which multiple signifieds are applied to a signifier at the institution stage. In this empirical analysis we note how TSLRIC and net costing came to represent all the failures of light-handed regulation. At the implementation and interpretation stage, we see how these meanings are displaced and overdetermined as groups struggle over the meaning of the terms, unpacking the nodal points.

The role of the subject is often overlooked in accounting and legal research, as there is a dearth of literature concerning the role of accounting, law, psychoanalysis, and the subject. Legal literature explores the gap between the 'collective norm' approach and individual subject positions in law (see Goodrich 1993, Carlson, 1999). Althusser theorises that ideology fills this gap:¹⁰³ i.e. the call to ideologies is an articulation of the gap between socially constructed concepts and our individual subject positions.

2 *Articulation*

Politics is the study of articulatory attempts to close systems:

¹⁰³ See the discussion of Althusser and ideology in Chapter six.

[DT] investigates the way social practices systematically form the identities of subjects and objects by articulating together a series of contingent signifying elements available in a discursive field (Howarth *et al*, 2000, p. 7).

Howarth *et al* acknowledge the paradox of ultimate contingency and the partial fixity of meaning: “If all social forms are contingent, if the ‘transition from “elements” to “moments” is never complete’ how then is *any* identity or social formation possible?” (Howarth *et al*, 2000, pp. 7-8). In answer, Laclau and Mouffe turn to nodal points:

The impossibility of an ultimate fixity of meaning implies that there have to be partial fixations – otherwise, the very flow of differences would be impossible. Even in order to differ, to subvert meaning, there has to be *a* meaning. If the social does not manage to fix itself in the intelligible and instituted forms of a *society*, the social only exists, however, as an effort to construct that impossible object. Any discourse is constituted as an attempt to dominate the field of discursivity, to arrest the flow of differences, to construct a centre. We will call the privileged discursive points of this partial fixation, *nodal points*.

...

The practice of articulation, therefore, consists in the construction of nodal points which partially fix meaning; and the partial character of this fixation proceeds from the openness of the social, a result, in its turn, of the constant overflowing of every discourse by the infinitude of the field of discursivity (Laclau & Mouffe, 2001, pp. 112-113). [Emphasis in Original].

“Nodal points are ... privileged signifiers or reference points ... in a discourse that bind together a particular ‘chain of significance’” (Howarth *et al*, 2000, p. 8). Laclau introduces ‘empty signifiers’ (representations absent of any particular meaning) by recognising that the need for social “fullness and universality” does not disappear: “it will always show itself through the presence of its absence” (1996a, p. 53):

Thus, the articulation of a political discourse can only take place around an empty signifier that functions as a nodal point. In other words, emptiness is now revealed as an essential quality of the nodal point, as an important condition of possibility for hegemonic success (Howarth *et al*, 2000, p. 9).

Moments of condensation and displacement are the realm of politics for Laclau and Mouffe in that the institution of ‘new’ social practices excludes alternatives.

<p>Core Empirical Concept: Nodal Point: an attempt to partially fix a discourse by offering a potential ‘meaning’. It is precisely the attempt at partial fixation or centring of a discourse. These bind together ‘chains of equivalence’.</p>
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There is very little accounting research incorporating the psychoanalytic, articulation, or overdetermination. Classic ideology critiques in accounting are the closest form of research (see Mitchell *et al* 1996; Hines, 1988; 1989; 1991; Morgan,

1988). Legal research incorporating DT tends to concentrate on macro-legal issues such as justice, rather than micro-legal processes (see Perelman, 1963; Coombe & Cohen, 1999; Coombe, 1998; Goodrich, 1993; Taibi, 1992; Wicke, 1991; and Butler *et al*, 2000). There is considerable scope to develop this critique in both law and accounting. Derrida's undecidability provides a pertinent example: consider the judge deciding the guilt of a person charged with a crime. A judge determines whether someone commits a crime as depicted in legislation. However, there is a gap between the general legislative rule and the particular case: the application of the rule to the case is not demonstrative, for if inscribed in the rule, the rule becomes particular and not general. For DT, each particular case illustrates the ontic as there is a gap between the rule and the concrete application of individual cases. In determining the case, the judge undertakes an act of articulation – filling the gap. This gap is the sphere of the judicial, and application is an act of articulation. The articulation is a rhetorical, unavoidable moment through the invocation of metaphor: as adapting the general to fit the particular is the equivalent of making the dissimilar similar.

However, politically, there is a problem as 'a' subject, the judge, completes the articulation. The judge assesses the appropriateness of the general law to the particular event. Thus, in a paradoxical moment, the judge must intervene by deciding if the law applies to the particular case, as any law could be self-enclosed in that it does not apply to this particularity. Thus, law is the moment of exception. Kelsen discusses this further in relation to juridical positivity (Kelsen, 1943). The terrain of undecidability creates the necessity for the decision moment: there is no *a priori* reasoning to support the contention that the general incorporates the particular. The decision moment represents a moment of subjectivity incorporating the distance between undecidability and the necessity of making a decision. Consequently, the decision moment is always

ambiguous as in attempting to close a partially constituted system this exposes the structural societal lack.

How are ‘articulations’ and ‘nodal points’ relevant to the empirical analysis?

TSLRIC and net costing were largely open for interpretation, as the Government provided little guidance as to the meaning of the terms. Thus, we trace how interested parties attempt to institute and articulate the meaning of the terms. ‘Cost’ is a technical, methodological, political, and rhetorical act. We examine the meanings attached by interested parties to TSLRIC and net costing.

Nodal point analysis then focuses on how TSLRIC and net costing come to represent the failures of the light-handed regulation, by examining how interested parties attach more meanings to what TSLRIC and net costing represent.

Thus, DT provides a unique way of interrogating the interface of law and accounting as its theoretical framework analyses the levels of politics in the construction of ‘cost’. As there are different costs for different purposes, DT interrogates the construction of cost: the ‘cost’ calculation is a rhetorical process; exclusions from the ‘cost’ calculation invites genealogical analysis; and a particular ‘cost’ calculation is an act of articulation. Secondly, any particular cost presented to the Telecommunications Commissioner is a nodal point as costing is an articulatory practice. Consequently, cost is empty of significance in filling the void from various potential options. Finally, in determining the appropriate cost to be applied to a particular ruling, the Telecommunications Commissioner is articulating a metaphor to fill the gap between the rule and the particular concrete case, as there is a gap between the theory and practice of cost (as discussed in Chapter three). Thus, as each particular case invokes the ontic, this gap is the sphere of the political, and the choice and construction of cost (the application) is an act of articulation.

The final ontological assumption relates to politics and democracy. For DT, politics is the process of examining, identifying, and exposing the contingent nature of social relations. Dislocation is both creative and disruptive.

F Assumption Five: Political subjects: Dislocation.

For Laclau and Mouffe, antagonistic relations threaten discursive systems. Through the logic of equivalence and difference, the existence of an identity cannot be integrated into an existing system of differences. The “logic of equivalence” functions “by creating equivalential identities that express a pure negation of a discursive system”, while the “logic of difference consists in the expansion of a given system of differences by dissolving existing chains of equivalence and incorporating those disarticulated elements into an expanding order” (Howarth *et al*, 2000, p. 11). This plays an important political role in social antagonism:

Each signifier constitutes a sign by attaching itself to a particular signified, inscribing itself as a difference within the signifying process. But if what we are trying to signify is not a difference but on the contrary a radical exclusion which is the ground and condition of all differences, in that case no production of *one more* difference can do the trick. As, however, all the means of representation are differential in nature, it is only if the differential nature of the signifying units is subverted, only if the signifiers empty themselves of their attachment to particular signifieds and assume the role of representing the pure being of the system – or, rather, the system as pure Being – that such signification is possible. What is the ontological ground of such a subversion, what makes it possible? The answer is: the split of each unit of signification that the system has to construct as the undecidable locus in which both the *logic of difference and the logic of equivalence* operate. It is only by privileging the dimension of equivalence to the point that its differential nature is almost entirely obliterated – that is, emptying it of its differential nature – that the system can signify itself as a totality (Laclau, 1994, pp. 170-171).

Core Empirical Concept: Logic of Equivalence: a discursive strategy by creating equivalences so as to collapse differences within a discursive system. Here, different identities are constructed as being linked and even identical.

Core Empirical Concept: Logic of Difference: a discursive strategy to expand the scope of a nodal point, by incorporating seemingly disparate or oppositional signifiers into a nodal point to expand the order.

Therefore, for DT, politics is contingent:

... the actions of subjects emerge because of the contingency of those discursive structures through which a subject obtains its identity (Howarth *et al*, 2000, p. 13).

Dislocation is “the process by which the contingency of discursive structures is made visible” and is disruptive and creative:

This ‘decentring’ of the structure through social processes such as the extension of capitalist relations to new spheres of social life shatters already existing identities and literally induces an identity crisis for the subject. However, dislocations are not solely traumatic occurrences. They also have a productive side. ‘If’, as Laclau puts it, ‘on the one hand they threaten identities, on the other, they are the foundation on which new identities are constituted. In other words, if dislocations disrupt identities and discourse, they also create a lack at the level of meaning that simulates new discursive constructions, which attempt to suture the dislocated structure. In short, it is the ‘failure’ of the structure, and as we have seen of those subject positions which are part of such a structure, that ‘compels’ the subject to act, to assert anew its subjectivity (Howarth *et al*, 2000, p. 13).

Core Empirical Concept: Dislocation: as both creative and disruptive, dislocation is the process by which the contingency of discursive structures is made visible. In particular, dislocations result from the ‘failure’ of structures

Dislocations create new opportunities for antagonism forming the conceptual underpinning of DT: “[t]he moment of antagonism where the undecidable nature of the alternatives and their resolution through power relations becomes fully visible constitutes the field of the ‘political’” (Laclau, 1990, p. 35). Howarth *et al* explain:

At the outset, social antagonisms introduce an irreconcilable negativity into social relations. This is because they reveal the limit points in society in which meaning is contested and cannot be stabilised. Antagonisms are thus evidence of the frontiers of a social formation ... [Antagonisms] show the points where identity is no longer fixed in a differential system, but is contested by forces which stand outside – or at the very limit – of that order. In doing so, their role is formative of social objectivity itself. As they cannot be reduced to the pre-constituted interests and identities of social agents, the construction of antagonisms and the institution of political frontiers between agents are partly *constitutive* of identities and of social objectivity itself ... In Lacanian terms, antagonisms disclose the *lack* at the heart of all social identity and objectivity ... ‘The limit of the social must be given within the social itself as something subverting it, destroying its ambition to constitute a full presence. Society never manages fully to be society, because everything in it is penetrated by its limits, which prevent it from constituting itself as an objective reality’. It is this central impossibility which ... makes necessary the production of empty signifiers, a production which in turn makes possible the articulation of political discourses, of partial fixations of meaning

...

They insist that social antagonisms occur because social agents are *unable* to attain fully their identity. Thus, an antagonism is seen to occur when ‘the presence of [an] “Other” prevents me from being totally myself. The relation arises not from full totalities, but from the impossibility of their constitution’. This ‘blockage’ of identity is a mutual experience for both the antagonising force and the force that is being antagonised (Howarth *et al*, 2000, pp. 9-10).

Laclau and Mouffe note that “[a]ntagonism is the ‘constitutive outside’ that accompanies the affirmation of all identity” (Laclau, 1990, p. 183):

... antagonism constitutes the limits of every objectivity, which is revealed as partial and precarious objectification. If language is a system of differences, antagonism is the failure of difference; in that sense, it situates itself within the limits of language and can only exist as the disruption of it – that is, as metaphor ...

Antagonism, far from being an objective relation, is a relation wherein the limits of every objectivity are *shown* – in the sense in which Wittgenstein used to say that what cannot be *said* can be *shown* (Laclau & Mouffe, 2001, p. 125).

Laclau acknowledges that although omnipresent, antagonism is not necessarily evident, arguing that there are sedimentations of potential antagonistic conflict:

... many relations and identities in our world do not seem to entail any denial: the relationship of a postman delivering a letter, buying a ticket to the cinema, having lunch with a friend in a restaurant, going to a concert (Laclau, 1990, p. 33).

However, what is important for Laclau is that all relationships and activities are implicitly antagonistic:¹⁰⁴

The moment of sedimentation ... entails a concealment. If objectivity is based on exclusion, the traces of the exclusion will always be somehow present ... The moment of antagonism where the undecidable nature of the alternatives and their resolution through power relations becomes fully visible constitutes the field of the 'political' ... (Laclau, 1990, pp. 34-35).

Antagonism, then, plays a constitutive role in democracy through its interrelationship with hegemony, as hegemony is the “type of political relation by which a particularity assumes the representation of an (impossible) universality incommensurable with it” (Laclau, 2001, p. 5). In illustrating the contingency of politics, Laclau explains that:

Democracy is suspended in an undecidable game between metaphor and metonymy: each of the competing forces in the democratic game tends to make as permanent as possible the occupation of the empty place of power; but if there was no simultaneous assertion of the contingent character of this occupation, there would be no democracy.

...

This incompleteness of the hegemonic game is what we call *politics*. The very possibility of a political society depends on the assertion and reproduction of this undecidability in the relation between the universal and the particular ... *democracy is the only truly political society ... there is only hegemony if the dichotomy universality/particularity is constantly renegotiated: universality only exists incarnating – and subverting – particularity, but, conversely, no particularity can become political without being the locus of universalising effects. Democracy, as a result, as the institutionalisation of this space of renegotiation, is the only truly political regime* (Laclau, 2001, pp. 8-10) [Emphasis in original].

Thus, politics is the process of trying to ‘fill’ the universal through a particular hegemonic claim with a tainted, particularised universality; but equally, this illustrates the universalisation of the particular – a ‘double contamination’ (Laclau, 2001, p. 11):

The two central features of a hegemonic intervention are, in this sense, the contingent character of the hegemonic articulations and their constitutive

¹⁰⁴ Norris critiques this, arguing that this reduces the political descriptive capacity of antagonism (2002, p. 559).

character, in the sense that they institute social relations in a primary sense, not depending on any a priori social rationality.

...

Hegemony means *contingent* articulation; contingency means *externality* of the articulating force *vis-à-vis* the articulated elements, and this externality cannot be thought of as an actual separation of levels within a fully constituted totality because there is no externality at all (Laclau, 1996a, p. 90-92) [Emphasis in original].

Consequently, dislocation theorises political activity through integrating contingency.

How are the ‘logic of equivalence’, ‘logic of difference’ and ‘dislocations’ relevant to the empirical analysis?

Hegemonic success is the ability to attach an increasing number of signifieds to a signifier, so as to empty the signifier of particular content. Therefore, we trace how through the logic of equivalence increasing numbers of signifieds are attached to signifiers to conceal confusion and contestation within the signifier.

The logic of difference is a discursive strategy to incorporate oppositional signifiers into a nodal point in order to expand the order and dispel opposition, by incorporating these disarticulated elements into the expanding signifier.

Dislocation examines how interested actors succeeded in sedimenting TSLRIC as the new regulatory practice in interconnection and net costing for the TSO. Consequently, the empirical chapters analyse potential dislocatory moments prior to the institution of the MIT, before moving to examine the ways in which interested parties begun to formulate the discourse around ‘cost’.

1 The Politics of Discourse Theory and Research Paradigms

DT rejects the simplistic political analysis suggested by positivism (as discussed in Chapter four) arguing against the search for scientific law-like generalisations and political analysis focusing on hypothesis testing, and challenges ‘naïve’ truth deduced from the objectivist epistemology. Further, DT challenges rationalism inherent within the conceptions of both PAT and contractarianism by arguing against the presumption that social actors have pre-given interests or preferences. It is uncomfortable with a social system that equates politics with the calculation of ‘economic self-interest’. In particular, DT argues that the problem of the systematicity of the systems (the failure to fully constitute structures) as well as the historical, social, and cultural contingency of social systems challenges the essentialist characteristics of the ‘self-interest’ model.

The DT rejection of positivism draws “critically” upon critical theory, social constructionism, and interpretivism (Howarth *et al*, 2000, p. 5). DT criticises interpretive political analysis that separates the social constructed world from the political actions of individuals within systems. Equally, DT is not concerned merely with understanding how social actors understand their social world, but holds that “meanings, interpretations, and practices are inextricably linked” (Howarth *et al*, 2000, p. 6). DT concentrates on examining the contingency and relational nature of social meanings, structures, and practices by concentrating on the dislocation, disruption, and change within social structures, practices, and meanings.

Therefore, DT requires the critical literature discussed in Chapter four as this provides the first step in the identification of power and politics. DT develops a theorised intervention at both the internal and external levels of politics, arguing that politics is ‘present’. The examination of the political implications of accounting is a common theme in critical literatures in law and accounting (Chua, 1986; Kennedy, 1983), but critical scholars argue that critical analysis is not enough on its own (In accounting, Baker & Bettner, 1997; Gray, Owen, & Adams, 1997; Gray, 2002; In law, Davies, 2002; Goodrich, 1993; Boyle, 1985; Brosnan, 1987). However, both critical schools are challenged for failing to ‘put things at risk’; for failing to draw out the implications of political critique: e.g. Brosnan critiques CLS’s attacks on legal positivism through which law operates, arguing

CLS ... has not succeeded in forming, or perhaps even laying the foundations of, a radical critique of [Liberal Legal Theory] ... (Brosnan, 1987, p. 263).

Moore, in accounting, argues that:

[Critical accounting] suggest[s] no serious or consistent consequences for its critique ... the critical attacks have placed nothing major at stake (Moore, 1991, p. 775).

DT critically reads critical theory and challenges Marxist theory in its post-Marxist movements. This chapter demonstrated the DT criticism of class reductionism and

economic determinism within Marxism. The post-structuralist critique of language deconstructs the class essence within Marxist analysis and invites a contingent reading of ideology (in contrast to the fixity of class ideology) (Howarth *et al*, 2000, p. 6-7). Consequently, DT politics involves the examination of historical and social change, conceived around the political concepts of hegemony, antagonism, and dislocation.

III CONCLUSION

This chapter articulated DT as the theoretical framework to examine the interface of law and accounting, as depicted by the regulation of NZ telecommunications. DT theorises and explains political ‘realities’ and movements, including societal complexity, the multiplicity of actors and organisations, and the drawing together of seemingly disparate groups in the ‘name’ of a political goal. The chapter argued that the focus on interrogating the discursive construction of social practices is appropriate for this thesis given the range of discourses: law, accounting, regulation, public policy, politics, and economics. The discursive focus invites rhetorical, genealogical, and deconstructive analysis to examine the strategies, effects, and aims of the regulation, industry players, Government, lawyers, accountants, and the use of cost accounting information in the regulatory process. The chapter concludes that:

- The complicated nature of the empirics requires a flexible theoretical framework. As DT looks both internally to the processes of law, accounting, and regulation, as well as examining the external effects of the political process, DT re-invigorates the political.
- In considering the interface of several disciplines, DT’s focus on ontology and the ontic provides a way to move through the bounded nature of epistemological inquiry (Hviding, 2003). DT, given its theoretical articulated nature, enables the researcher to consider a broad range of research questions in relation to the intersection of law, accounting, costing, regulation, and telecommunications.
- Accounting, law, and regulation are discursive practices making the focus on the linguistic turn attractive. Law, accounting, and regulation are linguistic practices, concentrating on the act of persuasion through the

employment of various rhetorical strategies. Law and accounting present many examples that illustrate the limits of language and the scope for contestation.

- The political is always implicated, as “some sort of shadowy underside of politics” (Devenney, 2002, p. 176). Law, accounting, and regulation are intimately political and this thesis unpacks the political in the interface of law and accounting as conceived by telecommunications regulation.
- Laclau and Mouffe’s model of political interaction holds that i) social objects are meaningfully constructed; ii) social objectivity is contingent, relational, and contextual, iii) discursive exteriors partially constitute and potentially subvert; iv) and identity is articulatory, and v) dislocation is an internal element to social totalities.

Consequently, Chapter six articulates DT as a research methodology and identifies appropriate research methods by examining the logics of critical explanation developed by Glynos and Howarth. Chapter six develops Glynos and Howarth’s social, political and fantasmatic logics as a methodological approach in response to the perceived normative and methodological limitations of DT.

- Chapter Six -

Research Methods and Methodology: Discourse Theory and the Logics of Critical Explanation

I *CHAPTER SIX OVERVIEW*

Chapter five introduced Laclau and Mouffe's DT - a political theory of democracy theorising and explaining political 'realities' and movements embracing societal complexity, multiple actors and organisations, and the drawing together of seemingly disparate groups in the 'name' of a political goal. Chapter five presented five ontological assumptions framing the DT intervention: i) social practice articulates and contests discourses that constitute social reality given that all social arrangements and organisations are meaningful; ii) social meaning is political as it is contextual, relational, and contingent via the process of articulation and the impact of rhetoric; iii) discursive exteriors partially constitute and potentially subvert by focusing on the construction of politics through hegemony, deconstruction, and genealogy which illustrates rhetorical attempts to close open systems and demonstrates that any 'name' representing the 'lack' (closure) creates another 'name' excluded from the signifying system; iv) political actors articulate that which 'fills' the social lack, thus DT focuses on politics by examining the act of articulating the latter; and v) politics is the process of examining, identifying, and exposing the contingent nature of social relations, as antagonistic relations threaten discursive systems, and dislocation is both creative and disruptive. This chapter examines the research methodologies and methods employed in this theoretical depiction of DT through three questions:

- 1) What are the methodological limitations of DT? Why do these challenge traditional research methods?
- 2) How do Glynos and Howarth's (2007) logics of critical explanation provide an analytical framework for the development of DT in relation to the interface of law and accounting?
- 3) What research methods will be used? Are interviews and document analysis an appropriate combination of methods? What methods of data

analysis will be used? What does DT's dislocation and rhetorical redescription provide to analyse the data?

This chapter introduces Glynos and Howarth's logics of critical explanation and social, political, and fantasmatic logics as an answer to the normative and methodological criticisms levelled against DT. Finally, the chapter discusses interviews and document analysis as data collection methods and dislocation and rhetorical redescriptions as approaches to such analysis.

The first section considers the role of methodology in DT, which challenges traditional research methods and methodologies due to its articulated nature and negative ontology. The logics of critical explanation are claimed to answer these methodological challenges.

II IMPLICATIONS OF DISCOURSE THEORY ON METHODOLOGY

The highly articulated nature of DT (in its range of theoretical influences) challenges the traditional use of empirics, research methods, and analytical methodologies. Research methodology must be commensurate with DT's negative ontology particularly when "no signifying structure can ever succeed in closing in on itself – it is irreducibly open" (Glynos, 1999, p. 3). DT is not a theory of application; but rather 'concrete' cases provide opportunity for theory development. Glynos suggests:

... the discourse analyst's starting point is not the mapping of pre-constituted, positively-defined, theoretical categories (rational self-interested ends, structural functions, competing lobbying interests, juridico-political forms of economic relations, typologies of democracies, forms of identities, etc) onto the socio-political landscape, and then invoking tools from corresponding idioms to conduct an analysis ... When dislocation and failure become ontologically foundational, the idioms with which we describe and analyse political phenomena change modality ... Discourse theory's anti-essentialist stance is thus maintained by adopting an ontology of lack, this being a direct consequence of taking seriously the constitutive nature of discourse in human practices (Glynos, 1999, p. 5).

For DT, the researcher identifies instances of dislocation and hegemony to study mechanisms employed by political actors to ‘repair’ the rift:

Political analysis, from a discourse-theoretic point of view, then, includes the study of the strategies and tactics deployed in constructing universalising chains of equivalence and/or in disrupting them. The important thing to keep in mind ... is that discourse theory’s ‘resting place’ ... is not a positively determined substance, but instead the very failure of the discursive substance to ever achieve final closure – in short, it takes dislocation as constitutive (Glynos, 1999, pp. 5-6).

In DT, “no strong methodological conclusions can be drawn from its negative ontology” (Glynos, 1999, p. 8). Thus, the theory does not predetermine analytical categories and “it can be fruitful to supplement [DT] with methods from other approaches to discourse analysis” (Phillips & Jorgenson, 2002, p. 24). The focus on contingency suggests that “meaningful analytical insight can only come from thoroughly detailed studies of concrete cases” (Glynos, 1999, p. 8). Laclau suggests that:

... these are tools that the researcher can decide *ad hoc* to use in each case for pragmatic reasons ... [T]hey are not unified in an established and orderly system of procedures called ‘methodology’ (Laclau, 1991).

The concrete case is vital. Glynos concludes:

In summary, we could say that discourse-theoretical efforts are informed by the fundamental insight that discourse is constitutive of, and thus internal to, human practices and that any adequate understanding of political phenomena must take it into account. It holds fast to a strong thesis which claims that any political explanation that omits to take discourse’s constitutive nature misses an opportunity to capitalise upon an important contribution that today’s philosophical resources make possible ... Again to dispel a potentially fatal misunderstanding: discourse theory is not at all suggesting the abandonment of so-called empirical approaches. After all, it cannot escape engaging with the empirical world ... Instead it is urging abandonment of certain outdated ontological presuppositions that still inform mainstream social sciences, without ignoring the considerable use-value attaching to its many methodological insights (Glynos, 1999, p. 10)

However, DT has methodological limitations.

A Filling the Gap: Articulating a Method for Discourse Theory

Critics allege two general deficits in DT: normative and methodological. The normative challenge results from a perceived ‘lack’ in the theory. Critchley argues:

If the theory of hegemony is simply the description of a positively existing state of affairs, then one risks emptying it of any critical function, that is, of leaving open any space between things as they are and things as they may otherwise be. If the theory of hegemony is the description of a factual state of affairs, then it risks

identification and complicity with the dislocatory logic of contemporary capitalist societies ... The problem with Laclau's discourse is that he makes noises of both sorts, both descriptive and normative, without sufficiently clarifying what it is that he is doing. This is what I mean by suggesting that there is the risk of a kind of normative deficit in the theory of hegemony (Critchley, 2004, 117).

The methodological challenge is that while DT provides an interesting description of the world, this 'redescription' does not reflect on causality and explanation:

(a) Discourse theory must demonstrate the analytical value of discourse theory in empirical studies that takes us beyond the mere illustration of the arguments and concepts. (b) It must address the core topics and areas within social and political science and not be content with specialising in allegedly 'soft' topics such as gender, ethnicity, and social movements. (c) It must critically reflect upon the questions of method and research strategy (Torfing, 1998, p. 198).

In response recent work, particularly at the University of Essex's Department of Government, has developed a method for applying DT, namely, the logics of critical explanation:

... I elaborate a method of articulatory practice [a logic of explanation] that avoids the difficulties surrounding the mechanical application of 'formal-abstract' theory to 'real-concrete' events and processes.

...

As against empiricism, discourse theorists maintain that there can be no unmediated access to the 'real-concrete'. Indeed, the very idea of 'accessing' the 'real-concrete' presupposes a gulf between the subject and object of knowledge, which objective knowledge somehow bridges. Instead, following Heidegger's critique of classical epistemology, it is better to conceive of the subject as 'always already' within a world of meaningful objects and practices, and to conceive of the norms of that world as providing the criteria for subjects to identify objects in the first place (Heidegger, 1962, pp. 88-90). In contrast, in order to counter the problems of logical derivation or theoretical subsumption, the employment of abstract tools to explain concrete objects requires a work of theoretical elaboration that *articulates* concepts and logics which are, initially at least, located at different levels of abstraction, focused on different levels of analysis, and drawn from a variety of theoretical problematics (Howarth, 1998, pp. 316, 321-322).

Glynos and Howarth trace five movements in developing the "logics of critical explanation" (Howarth, 2000; 2002; 2004; Glynos, 1999; Griggs & Howarth, 2007; Howarth & Glynos, 2007).

B The Five Movements: Developing the Logics of Critical Explanation

Glynos and Howarth stress the importance of 'problematization' as the starting point for social inquiry. For Foucault, problematization is "the development of a domain of acts, practices, and thoughts that seem ... to pose problems for politics" (Foucault, 2000, 114), and it concerns "a movement of critical analysis in which one tries to see

how the different solutions to a problem have been constructed; but also how these different solutions result from a specific form of problematisation” (Foucault, 2000, 118-119). Empirical DT research should address present problems rather than focusing on technique or method-driven research as in positivist or normative research. Through DT, the researcher considers historical and discursive practices that constitute practices and institutions in a particular context. It is a species of critical theory, seeking to critique by rejecting a fact-value separation and highlighting the implications of ethics and ideologies bearing upon the problem under examination:

The notion of discourse ... has its distant roots in what can be called the transcendental turn in modern philosophy – i.e., a type of analysis primarily addressed not to *facts* but to their *conditions of possibility*. The basic hypothesis is that the very possibility of perception, thought and action depends on the structuration of a certain meaningful field which pre-exists any factual immediacy (Laclau, 1993, p. 431).

Consequently, there is a double transcendental turn in DT. The first is hermeneutic: at the epistemological level, facts and meanings are attached; at the ontological level, they are constitutive of the social world. Consequently, conditions of possibility and impossibility illustrate the post-structural critique of meaning and subject, namely that there is an inherent lack of the subject and subject experience within systems of meaning. The logics of critical explanation examine the conditions and dislocations that allow for meanings (at the hermeneutic level) in the moment of constitution and for subjects (at the ideological/ethical level) to emerge, shift, or change.

This study focuses on why TSRLIC, cost-plus pricing for interconnection and net costing for the TSO were chosen as methods for regulation in NZ, and how cost information is used in the regulatory process for interconnection and TSO costing. However, despite ‘cost’ being a problematic concept, as Chapter three illustrated, it is increasingly a regulatory tool despite incorrect assumptions that it is ‘objective’ within economics and law. ‘Cost’ is a common feature of public discourse, representing a powerful social logic measure. The presumption is that the public comprehend what is

identified as cost – it is a figure – and numbers are a powerful means of representation. Politically, cost is a powerful rhetorical and ideological mechanism, as *society* holds a notion of objectivity of cost, whilst tending to distinguish between aspects of personal ‘life’ where cost is and is not acceptable. Recent NZ examples of public debates where cost has been prominent include Transmission Gully (too expensive, not worth it),¹⁰⁵ the construction of Stadium NZ (cost debate),¹⁰⁶ drug purchases (the Herceptin debate, too expensive),¹⁰⁷ and tax cuts.¹⁰⁸ These examples demonstrate the political and fantasmatic strength of the logic of cost. Liberal neo-classical economics incorporates the pillars of utility and demand, with the powerful measure of individuated “willingness and ability to pay”. However, public cost discourse only recognises one aspect of this measure, namely cost, which in a public sense, measures willingness to pay, but excludes the ‘ability to pay’. In public works projects and capital investment decisions, cost represents a collective measure. Consequently, the political logics of cost are explicitly a mechanism for rhetoric (that convinces that this costing is better than alternative costings and that this cost is worth it). However, the cost discourse is complex and political. Issues include: what does the ‘costing’ include? How is ‘cost’ represented? Is the ‘cost’ realistic? What is valued? What is excluded? Can it be effectively costed? Is there a greater good at work? Equally, with public work cost, rhetoric tends to include the Not-in-my-Backyard (NIMBY) and the Build-absolutely-nothing-anywhere-near-anyone (BANANA) effects. Thus, Chapter three demonstrated

¹⁰⁵ Transmission Gully concerns the construction of a third road out of Wellington, given that the current State Highway One is a dangerous and busy stretch of road.

¹⁰⁶ As host of the Rugby World Cup 2011, this debate concerned the proposed construction of a “Stadium NZ” to host the final of this competition.

¹⁰⁷ Herceptin is a breast cancer drug. Most jurisdictions fund Herceptin for twelve-months following the detection of breast cancer. Initially, Pharmac (the NZ drug buying agency) declined to purchase Herceptin due to the cost, and then decided to supply for a nine-week period (sighting a particular study that suggested there were no extra benefits following nine weeks of use and cost).

¹⁰⁸ Despite a period of sustained economic growth and record government surpluses, the Labour-led Government refused to cut taxes for nine years, until 2008. Rhetorically, the Government could not afford it as it was too costly.

that cost is a present problem, and to address this, the thesis draws on the ‘logics of critical explanation’.

Second, Glynos and Howarth introduce retroduction. In philosophy, induction and deduction are problematic. In induction, the problem is referred to as the ‘inductivist turkey’: consider the following story:

A turkey is fed grain on day 1 at 6 am. The turkey is fed grain on day 2 at 6 am. The turkey is fed grain on day 3 at 6 am ... the turkey is fed grain on day 364 at 6 am.

Through principles of induction, namely taking observable phenomenon and inducing general axioms, on day 365 the turkey would be fed grain at 6 am. Unfortunately, on day 365, the turkey loses its head and is served as Christmas Day dinner (Russell, 1912, p. 63). Induction is limited because individuals cannot observe what cannot be seen, and hence there is the possibility that the next observation could disprove the general axiom. Equally, there is a subsumption problem within deductivism that construes particular statements from general axioms. There are problems from subsuming phenomena into pre-existing categories: there is no way of testing whether pre-existing categories or particular observations are correct. All deduction is susceptible to scepticism due to these limitations. Glynos and Howarth (2007) suggest retroduction is a possible solution. Hanson explains:

1. Some surprising phenomena p1, p2, p3 ... are encountered.
2. But p1, p2, p3 ... would not be surprising were a hypothesis of H’s type to obtain. They would follow as a matter of course from something like H and would be explained by it.
3. Therefore there is good reason for elaborating a hypothesis of the type H; for proposing it as a possible hypothesis from whose assumption p1, p2, p3 ... might be explained (Hanson, 1958, pp. 86-87).

Retroduction is a means of making phenomena intelligible, “amount[ing] to ... observing a fact and then professing to say what ... it was that give rise to the fact” (Sayer, 1986, p. 116). This challenges the constraint of the double hermeneutic, which denotes the limits imposed by discourse analysts engaging in interpreting self-

interpretations of actors. To avoid criticisms of detachability or subsumption, Glynos and Howarth argue that the researcher should ‘pass through’ the self-interpretations of subjects under investigation, as they are not objects, and self-interpretations may be misleading, being particular, partial, interpretive, and ideological. The scope to examine phenomena retroductively through the social, political, and fantasmatic logics in combination with tools of rhetoric provides a theorised intervention through the double hermeneutic: it is the combination of identifying the social landscape, examining how the social landscape was instituted, what alternatives were excluded, and the associated ideologies that justifies this methodological approach. This thesis examines retroduction, seeing the incorporation of ‘cost’ as the central regulatory tool in the TA 2001 as a ‘fact’, and studying ‘what gave rise to’ this ‘fact’ by focusing on the questions: why was TSLRIC, cost-plus pricing for interconnection and net costing for the TSO chosen as the methods for regulation, and how was cost information used in the regulatory process for interconnection and TSO costing?

<p>Core Empirical Concept: Retroductive Logic: means to make phenomena intelligible by observing a fact and then examining the historical, social, cultural, and political circumstances and events giving rise to its institution.</p>
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Third, Glynos and Howarth introduce logics. Laclau discusses the notion of a formalised content of the explanans resulting from the retroductive exercise. Logics provide a mechanism to understand rules that govern a particular practice, as well as the ontological presuppositions incorporated in both objects and subjects. As a unit of explanation, logics interrogate the ‘essence’ of rules governing practices, as well as practices themselves. However, it is not only the existence of the rules and practices that are of interest, but also, at the ontological level, what rules have to be like to materialise, and what rules *allow* objects and subjects to *be*. Glynos and Howarth claim three forms of logics pertinent for this examination: social, political, and fantasmatic.

Social logics examine the rules, practices, concepts, categories, and sedimented social practices that structure social interactions and relations (Howarth, 2004). Ontologically, social logics provide a space for characterising social relations through a strongly contextualised reading of the social landscape. However, this is the limit of social logics, akin to the limits of Foucault's archaeology. Laclau explains that:

'Social logics consist in rule following' and so involve 'a rarefied system of statements, i.e. a system of *rules* drawing a horizon within which some objects are representable while others are excluded. We can thus speak of the logics of kinship, of the market, even of chess-playing (to use Wittgenstein's example) (Laclau, 2005, p. 117).

The social logic provides an explanation of the historicity of social practices in the critical theory sense of inter-subjective objectivity. It examines their absorption into day-to-day practices or taken-for-granted regimes of social norms.

In terms of social logics, a strength of management accounting research has been the consideration of rules and practices that help reproduce cost discourse,¹⁰⁹ e.g. for ABC, absorption costing, balanced scorecard, responsibility accounting, Cost-Volume-Profit analysis, variance analysis, budgeting, and cost control; and the institutions within which these techniques occur e.g. CIMA, educational institutions, professional bodies, and interrelationships between the sub-disciplines of accounting. Such research represents examples of Glynnos and Howarth's social logics.

Core Empirical Concept: Social Logic: rules, practices, concepts, categories, and sedimented social practices that structure social interactions and relations identified through a strongly contextualised reading of the social landscape.

Political logics consider the space where the emergence, institution, and constitution of new norms, rules, and social practices are publicly contested. Political logics refer to the public contestation and political struggle leading to the institution of particular practices and relations over competing representations of the social (Howarth, 2004; Howarth, 2000). In DT, concepts like articulation, moments, elements, nodal

¹⁰⁹ See the discussion on cost and accounting in Chapter three.

points, empty signifiers, the logic of equivalence and difference, and dislocation provide insight into political contestation and attempts to close social systems. Political logics have three elements: a) explanations of events leading up to moments of dislocation that expose the radical contingency of sedimented social practices; b) identification of ‘political’ struggles over what discourse to institute (to cover over the exposed contingency) through the logic of equivalence; and c) illuminating (in a genealogical sense) struggles excluded or marginalised through the logics of difference.

When employing political logics, the task is to identify dislocatory moments in the historical landscape of cost, costing, and cost techniques that disrupt and institutionalise sedimented social practices. In contrast to social logics, this goes beyond describing rules and practices to identifying the events leading to disruption, and political struggles over the institution of social practices and relations. This canvasses elements of disruption, dislocation, and attempts to articulate sedimented practice, as discussed in Chapter five. The three general ‘political logic’ questions include:

- a) What events led up to the re-regulation of telecommunications? At the time of ‘re-regulation’, which discourses made possible the institution of TSLRIC for interconnection and net costing for the TSO?
- b) What were the political tensions and struggles that took place over the institution of TSLRIC and net costing? What were the competing claims of interested parties?
- c) Which political interests within the struggles succeeded over others? How did this occur? What political interests within struggles were marginalised or excluded as a result of the institution?

The first four chapters examine dislocation and political logics by giving a genealogical account of telecommunications regulation; the complexities of regulation and the inherent lack within regulatory theory; the theoretical and practical interface between law and accounting; the technical, methodological, and political levels within cost accounting information; the socially constructed, arbitrary, and subjective nature of costing, and contestation over the terms accounting, law, regulation, and cost within

different research paradigms. This illustrates the scope for contestation over the institution of cost-based regulation at the interface of law and accounting examined in the thesis: namely why include cost-based regulation in the TA 2001 and what was the scope for contesting the implementation and interpretation of the Act?

Core Empirical Concept: Political Logic: the space in which the emergence, institution, and constitution of new norms, rules, and social practices are publicly contested. This includes the public contestation and political struggle that lead to the institution of particular practices and relations over other representations of the practice.

Fantasmatic logics consider how subjects are ‘gripped’ by ideologies to maintain social practices, providing a bridge between the ontic, i.e. regions of existence, and the ontological, i.e. categorical presuppositions of existence, through a mediated process of reflection. The fantasmatic theorises their constituent elements at the subject-ideological level as the sedimentation of social practices drawing on Žižek and Lacan. This ‘logic’ explains and potentially critiques how subjects are ‘gripped’ by ideological presuppositions and pathologies that sustain their identity, and are attached to political and social logics (Howarth, 2004). Ideology ‘closes’ the radical contingency at the centre of the political struggle. Equally, the fantasmatic provides a space to consider how ideology allows a subject to enjoy a ‘good’ life, while suppressing the inauthenticity and impossibility of closing the contingency. This interrogation enables the identification of the exclusion of ethical and alternative ways of living. As Althusser explained:

ideology “acts” or “functions” in such a way that it “recruits” among the individuals (it recruits them all), or “transforms” the individuals into subjects (it transforms them all) by that very precise operation which I have called *interpellation* or hailing, and which can be imagined along the lines of the most commonplace everyday police (or other) hailing: “Hey, you there!”

Assuming that the theoretical scene I have imagined takes place in the street, the hailed individual will turn round. By this mere one-hundred-and-eighty-degree physical conversion, he becomes a *subject*. Why? Because he has recognised that the hail was “really” addressed to him, and that “it was *really* him that was hailed” (and not someone else) (Althusser, 1994, pp. 130-131).

Fantasmatic analysis shifts the focus from the social and political (from focusing on the sedimentation and institution of cost) to the subject, by examining how the social landscape is sustained in the subject. What is it about cost (TSLRIC and net costing) that makes it so persuasive? Why does cost ‘grip’ us? Why do lawyers and economists not accept the constructed nature of ‘costing’? In psychoanalytic terms, what ideologues attach to cost, enabling the radical contingency of cost to be covered over? What, in other words, enables subjects to ‘mis-recognise’ the nature of cost as ‘objective’, as opposed to radically contingent? How does this mis-recognition allow subjects to enjoy “their thing” and what pathologies flow from this mis-recognition? In answering these questions, Glynos and Howarth point to Lacanian psychoanalysis, as an ideology critique that enables critical theory to be mobilised in critical explanation. Such analyses concentrate on demystifying and defetishising critiques to expose the irrational basis of such ideologues (and hopefully ridding cost of some of its power to ‘grip’ us) and to expose their partisan nature.

There are limited examples of this ideology critique in cost or management accounting, e.g. Scapens’ (1985) conditional truth critique of the absolute truth notion within economic cost, Covalleski *et al*’s (2003) criticism of the subjectivity of TCE in US utilities regulation, and Major and Hopper’s study (2005) of the fragmented implementation of ABC in Portuguese telecommunications. Elsewhere within the accounting literature there are examples of ideology critique, e.g. questioning the ability of professions to serve the public interest or establish coherent (epistemologically stable) conceptual frameworks; on accounting’s neoclassical economic foundations; and the role of experts in reproducing disciplinary power (see, Mitchell, Sikka, and Wilmott, 1996; Hines, 1988; Hines, 1989; Hines, 1991; and Arrington & Francis, 1989). Equally, criticisms of the rationality and rhetorical effects of the positivist paradigm within accounting is a form of fantasmatic research (see Arrington & Francis 1989; Arrington

& Puxty, 1991 Arrington & Schweiker, 1992; Arrington & Francis, 1993; and Chua, 1986; Christenson, 1983; Sterling, 1990; Williams, 1989; Chambers, 1993; and Deegan, 2006). Their general characteristics are the exposure of rhetorical strategies employed to achieve a semblance of rationality and reasonableness within argumentation and highlighting the hidden social and political consequences of such strategies in accounting. Thus, fantasmatic logics expose the contradictions, the results and excluded alternatives mobilised by claims of “objectivity”, “truthfulness”, and “the greater good”.

Core Empirical Concept: Fantasmatic Logic: by focusing on the subject, this provides space to examine how subjects are ‘gripped’ by ideologies that allow social practices to continue. The fantasmatic theorises the constituent elements at the subject-ideological level, by explaining and potentially critiquing how subjects are ‘gripped’ by ideological presuppositions and pathologies that sustain their identity, and are attached to the political and social logics.

Fourth, Glynos and Howarth return to articulation, which is related to the identification of nodal points (Laclau & Mouffe, 2001, pp. 112-113). For Howarth *et al*, these are “privileged signifiers or reference points (‘points de capiton’ in the Lacanian vocabulary) in a discourse that bind together a particular ‘chain of significance’” (2000, p. 8). When researching empirical material, articulation is the act of judgment that connects a heterogeneous set of logics that explain phenomena at the social, political, and fantasmatic level. Articulation links the logics within their context to provide a coherent account explaining the single problematised phenomena. This is executed by focusing on two empirical questions identified at the top of p. 208. The theoretical discussions within Chapters two, three, and four provide the theoretical context for the empirical analysis. They include a genealogical account of telecommunications regulation; the complexities and limitations of existing regulatory theory; the interface between law and accounting; the technical, methodological, and political levels within cost accounting information; and the contestation between different research paradigms. This embedded articulation constitutes a response to Torfing’s alleged methodological deficit.

Finally, Glynos and Howarth consider ‘critique’ i.e. recognising the “contestable character of your own projections, by offering readings of contemporary life that compete with alternative accounts, and by moving back and forth between these two levels” (Connolly, 1995, p. 36). The employment of political and fantasmatic logics intrinsically enables the possibility of critique, especially when a moment of dislocation (leading to the institution of new social practices) is penetrated by radical contingency. Thus, dislocatory moments make the ‘lack’ visible. By identifying attempts to cover over this radical contingency, along with ideological attempts to close the lack within subjects, this reveals excluded and marginalised possibilities. This provides the basis for critique and takes DT beyond descriptivism, addressing Critchley’s allegations of a normative deficit in DT.

Therefore, after examining the constituent elements of the logics of critical explanation, the next section considers the empirical methods used in the thesis. In particular, it discusses interviews and document analysis as methods of data collection, as well as identifying the approach to data analysis, particularly in relation to dislocation and rhetorical redescription.

III RESEARCH METHODS AND METHODOLOGY

A Research Methodology: Collection and Analysis of Data

There is nothing outside the text (Derrida, 1976, p. 158).

It is so convenient that we have language: We can ask people what they see, think, feel ... and they'll tell us! (Boree, 2004)

For DT, there is a need to understand (Norval, 2000), particularly society’s failure to fully constitute itself based on the ontology of lack. This ‘understanding’ is multifaceted, and for the DT, the research aim is to experience, explore, and engage in the social, cultural, and political setting that constitutes the research site. Empirical

research focuses on developing an intimate knowledge of discourses (accounting, law, and regulation), the social and political interfaces between the professions, actors, and regulatory process, and identifying moments of dislocation (contention, acceptance, argument, dispute, disagreement, agreement, agitation, concession, judgment, comment, and questioning), as these events constitute the space in which the political institution and constitution of social practice occurs. A DT researcher should employ various qualitative research methods to gather broad data (Howarth *et al*, 2000). Consequently, this study employs focused, unstructured interviews and document analysis.¹¹⁰

1 Documents

May describes the use of document analysis in social research:

Documents, as the sedimentations of social practices, have the potential to inform and structure the decisions which people make on a daily and longer-term basis; they also constitute particular readings of social events (May, 1997, pp. 157-158).

Howarth recognises that documents provide important non-reactive, linguistic research data in DT and comments on common difficulties of archival research and DT, including the ‘construction of a documentary archive’:

... it is possible to treat *all data as text* ... Discourse theory needs ... to guard against charges of linguistic reductionism, in which practices are merely the effects of texts, while ... it must not conceive texts as purely epiphenomenal – as the effects of more objective and deeply rooted logics ... Derrida suggests there are no fully saturated contexts, as the traces of signifiers are always detectable in innumerable other contexts. Instead, the researcher is compelled to make decisions about the appropriate level and degree of contextualisation and must establish the limits of any particular project. The key principles underpinning these decisions are that they must be explicit, consistent, and justified (Howarth, 2004, pp. 336-337).

Importantly, in this study, all information is publicly available and accessible.

An integral part of the ‘democratic’ process of NZ’s Parliament is that Government documents within the legislative process are publicly available, either on Government websites or in the Parliamentary Library. The key sites for documentary material include:

¹¹⁰ It should be noted that there is an experiential element to the thesis, given my previous employment as a regulatory lawyer. See the validity discussion below.

- a) The MIT website (<www.teleinquiry.co.nz>), which contains an archival record of the MIT's terms of reference, the Issues Paper, Draft Report, and the Final Report, as well as all submissions to the MIT.
- b) The MED website and library (<www.med.govt.nz>), which contain archival records of various 'official' media statements, background documents on the telecommunications industry, and information about the regulatory regime prior to the MIT;
- c) The Parliamentary Library, which contains an archival record commerce select committee's consideration of the Telecommunications Bill, submissions to the committee, the Officials Report on submissions, and the select committee report;
- d) NZ Parliamentary website (<www.parliament.govt.nz>), which contains various archival records of parliamentary consideration of the Telecommunications Bill;
- e) Hansard, which contains an archival record of Parliamentary debates within the House of Representatives. Relevant debates include the first reading of the Telecommunications Bill on Wednesday May 9, 2001; the second reading on Tuesday, November 27, 2001, and the third reading and subsequent passage of the Bill on Tuesday, December 18, 2001; and
- f) The CC website (<www.comcom.govt.nz>), which contains an archival record of data gathering by the CC in the early implementation stages of the Telecommunication Act; the entire TSLRIC process including submissions, and the draft and final determinations; and records of the annual TSO net costing process including building the model, submissions, and the draft and final determinations; as well as other documents including special interest papers and commissioned research. Note that the CC removes commercially sensitive information from these publicly available documents.

These public-source documents provide an important record of key events in the historical, social, political, and fantasmatic institution and implementation of cost-based regulation of telecommunications. Equally, interviews were invaluable.

2 *Interviews*

Focused, unstructured interviews were used to collect data. For Howarth, interviews constitute linguistic, reactive research:

For an approach that stresses the importance of subjectivity in explaining social reality, and which seeks to provide 'thick descriptions' of events and processes ... in-depth qualitative interviewing is an important way of generating primary texts (Howarth, 2004, p. 338).

The scope and inter-disciplinary nature of this project lent itself to interviews with various interested parties. Howarth provides some insight on interviews in relation to DT:

In short ... we are confronted with the difficulty of validating and corroborating what is said in interviews, of analysing information which we believe either to be true or false, and of accessing information what remains deliberately or unintentionally hidden ... comparing different sorts of data (quantitative or qualitative, primary and secondary) and different types of method (for example, interviews and textual analysis) to see whether they support one another ... is useful in validating evidence obtained during interviews. Moreover, material which is shown to be false, distorted, or partial can and ought to be analysed precisely *because* of their inaccuracies and concealments ... they may themselves constitute important windows 'into actors' understandings and interpretations of events. Hyperbolic representations, omissions, over-wording, slips, and unusual collocations thus constitute valuable points of condensation in an interview, which require closer inspection and analysis ... Finally, it is important to acknowledge the limits of information gleaned from interviews ... and thus to supplement interview data with other sources such as primary documents ... secondary interpretations, interviews from different places of enunciation, and so on (Howarth, 2005, p. 339).

Finally, Howarth raises important points about the role of the interviewer:

... a critical reflexivity about one's theoretical assumptions and research project, while adopting an 'ethos of openness' to the other, are useful ways of guarding against the temptation to reduce the other's discourse to familiar and self-serving purposes. In short, it is to view the dialogical relationship between interviewer and interviewee as ... an encounter in language with all the attendant difficulties post-structuralists have noted about communication in general (Howarth, 2005, pp. 339-340).

Although an interview with predetermined questions is an appropriate research technique, allowing interviewers opportunity to speak more freely enhances the potential for richer, more informative material (Fontana & Frey, 2000, p. 652). Nevertheless, as with all interviews it is impossible to avoid leading and limiting discussion. May suggests that for general exploratory, phenomenological, or ethnographic work, focused, unstructured interviews are the most appropriate (May, 1997, p. 112). Their characteristics include flexibility and meaning (Pahl, 1995, p. 197) that encourages greater qualitative depth by allowing:

interviewees to talk about the subject in terms of their own frames of reference. By this, I mean drawing upon ideas and meanings with which they are familiar. This allows the meanings that individuals attribute to events and relationships to be understood on their own terms (May, 1997, p. 113).

Twelve interviews were conducted, ranging from 42 minutes to 163 minutes.

They were of a focused, unstructured nature, and were tape recorded for subsequent

transcribing. Limited notes were also made during the interviews. Those interviewed represented a broad range of interested parties and ‘non-elites’, including a senior adviser in the Telecommunications Commission, lawyers, academics, accountants, and broader political spokespeople.

B The Mix of Research Methods

The combination of interviews and document analysis is common in DT (Barros & Castagnola, 2000; Bastow & Martin, 2003; Clohesy, 2000; Griggs & Howarth, 2002; Howarth, 2000; Howarth & Griggs, 2007; and Stavrakakis, 2000). Two studies by Howarth and Griggs are particularly relevant to this study, due to their link to regulation:

- 1) In a study of the rhetoric employed in “Freedom to Fly” in the UK, the authors examined “official public discourse”, including media statements, interviews of elite actors, articles in national newspapers, in-depth interviews, as well as analysis of the consultation process about aviation expansion 2000-2003 (Howarth & Griggs, 2007).
- 2) A study of the campaign against the building of the second runway at Manchester Airport, studied the ‘volvos and vegans’ alliance, examining how local residents and ‘direct action’ protesters combined in a ‘counter-hegemonic’ campaign. The empirical material included official public discourse, such as media statements and newspaper articles, as well as in-depth interviews with key actors (Griggs & Howarth, 2002).

Thus, the combination of official public discourse and in-depth interviews is commonly employed in empirical DT research. The next section concentrates on explaining how the data was analysed in light of DT and by considering the role of dislocations and rhetorical redescriptions.

C Analysis of Data

The focus of textual analysis in DT is to “locate and analyse the mechanisms by which meaning is produced, fixed, contested, and subverted within particular texts” (Howarth, 2004, p. 341). These DT logics include the logics of equivalence and

difference, the production of floating and empty signifiers, iterability, and the tools of rhetoric. Textual analysis is the principal method here to analyse data. Silverman argues that:

What does it mean to approach texts for what they are? ... [D]iscourse analysis focuses on how different versions of the world are produced through the use of interpretive repertoires, claims to 'stakes' in an account, and constructions of knowing subjects (Silverman, 1994, p. 826).

The document and interview empirics were largely analysed as a single data set. Bourdieu argues that the analysis of talk (both interview and documentary material) should extend beyond linguistic analysis, i.e. as if they were constructed in a linguistic, hermeneutically sealed universe (1992). For Bourdieu, positioning involves explaining the position of the speaker in terms of class, ethnicity, gender, and occupation. By concentrating on the speech act the research will overlook this detail (May, 1997, p. 127).

In discourse, that which is said is only part of the story. What is not said, how it is said, non-vocal elements, setting, and context are equally important. Feminist interview techniques, e.g. emphasise that interview analysis should focus not only on motivations and reasons, but also on social identities and their construction within the social settings in which people live and work (Smith, 1988). In DT, the analytical focus moves beyond the performativity of the speech itself, to how discourses order a domain of reality with repercussions beyond those understood or intended by the speaker. Such discourse can 'silence' certain voices by constructing channels of communications that authorise only certain persons to speak in particular ways (Wetherall & Potter, 1988).

Qualitative document analysis starts with the idea of process, or social context, and views the author of the document as a "self-conscious actor addressing an audience under particular circumstances" (May, 1997, p. 173). The analytical task is a 'reading' of the text in terms of its symbols, and includes deconstruction, interpretation, and

reconstruction. It is an inherently flexible process, enabling the researcher to consider not how meaning is constructed, but how these meanings are developed and employed. Of importance is the divorce between the author's intended meaning (in writing text) and the reader's received meaning (in reading the text). Thus, any text is full of potential readings.

Furthermore, given the ability to observe events leading to a decision, it provides a comparative ability to analyse how the document represents the events that it describes and closes off potential contrary interpretations by the reader. In short, from a critical-analytic standpoint, it is possible to analyse the ways a text attempts to stamp its authority upon the social world it describes. In relation to the research questions underpinning this study, it was important to trace the particular characterisation of the social world by understanding what information was excluded from decisions by the CC, and the particular characterisations of events and people according to certain interests.

Although an emphasis on intended and received meaning is important, analysis also examined content meaning. The connection between the signified and the signifier, and particularly, the connection between signifieds and an empty signifier is vital in DT analysis. In certain ways it is akin to semiotics (May, 1997, p. 173). However, semiotics tends to hold that language is a complete system, whereas DT holds the "absent fullness" of any system. Howarth provides insight into the 'legitimate and illegitimate' employment of the logics of DT in conducting textual analysis:

... a fully fledged analysis would have to describe and analyse the array of micro- and macro- practices – both 'linguistic' and 'non-linguistic' – that produced such divisions and conflicts, in which the textual analysis constitutes an internal component of the wider enterprise. In short, the narrow textual analysis of official documents, public statements, newspaper reports, party political manifestos ... constitutes only one aspect of a fully fledged discursive analysis. It needs always to be supplemented with in-depth interviews, thick descriptions of practices and institutions, historical reconstructions of phenomena drawing on a range of empirical data, and so forth (Howarth, 2004, p. 342).

The following section considers the nature of the empirical material in this PhD, describing the mechanics of the analysis of empirical material and the two methodological techniques employed.

D Analysing the Empirical Data: Dislocation and Rhetorical Redescription

Empirically, this thesis addresses how governments seek and achieve forms of ideological protection for the introduction of a new Telecommunication's regulatory regime. In concentrating analysis principally on the "official public discourse" of the 're-regulation' of Telecommunications, it concentrates on: why did a cost-plus pricing model (namely, TSLRIC) for interconnection, and net costing for the TSO become the basis for regulating telecommunications in NZ? The second empirical level considers the implementation and introduction of the 'rules of regulation' encapsulated by the TA, by focusing on how cost accounting information is used in the regulatory process by accountants, lawyers, and regulators. Analytically, the thesis concentrates on the analysis of dislocation and the construction of nodal points and rhetorical redescription.

1 Dislocation and Constructing Nodal Points

The empirical questions lend themselves to the DT notion of dislocation i.e. attempts by political actors to articulate a 'new' discourse centred on particular nodal points. In this case, the focus is on how actors construct the debate around the nodal point of 'cost'. As Chapter five notes, dislocation is the process by which the contingency of discursive structures is made visible, and is both disruptive and creative (Howarth *et al*, 2000, p. 13). Laclau notes that:

If on the one hand they threaten identities, on the other, they are the foundation of which new identities are constructed (Laclau, 1990, p. 39).

Identifying dislocations is challenging, and there are limitations surrounding the recognition of dislocatory moments, including:

- 1) The subjectivity of actors (what may appear to the researcher to be a dislocatory moment for one group in a political struggle may have a counter-effect on other groups);
- 2) With hindsight, it may be easy to diagnose ‘dislocatory’ events, but at the time it may have been difficult for actors to recognise such events;
- 3) Another political group may identify differently with events that appear dislocatory to one group of political actors.
- 4) A dislocatory moment does not necessarily lead to change, as noted in the Gramscian notion of revolution. A dominant hegemony may withstand pressure from a counter-hegemonic force, and accommodate or suppress the forces of challenge; and
- 5) The search for dislocations may appear to be the search for origins. In genealogical terms, the emphasis is on identifying moments where options existed and choices were made to the demise of other potentialities.

Stavrakakis acknowledges this difficulty in his overview of the theory of dislocation when studying the emergence of ‘Green’ ideology:

A theory of dislocation ... focuses on the element of negativity inherent in human experience, on the element of rupture and crisis threatening and subverting our social – ideological – forms, the field of social objectivity ... [the] theory of dislocation belongs to a type of theorisation and political analysis which is based on the assumption that understanding social reality is not equivalent to understanding what society is ... but what prevents it from being. What prevents it from being what it promises to be is the force of dislocation; which is also – this is the crucial part for the analysis developed here – what generates new ideological attempts to reach this impossible goal (Stavrakakis, 2000, p. 100).

At the political logic level, dislocation results in actors seeking to construct a ‘new’ discourse centred on certain nodal points, in an attempt to exclude certain alternatives, and sediment new social practices (Howarth *et al*, 2000, p. 9). This thesis examines how interested actors succeeded in sedimenting TSLRIC as the new regulatory practice in interconnection and net costing for the TSO. Consequently, the empirical chapter analyses potential dislocatory moments prior to the institution of the MIT and examines how interested parties began to formulate the discourse around ‘cost’. The data are analysed through social, political, and fantasmatic logics.

2 *Rhetorical Redescription (Paradiastole)*

The empirical questions focus on rhetoric, how actors articulate the metaphorical element of ‘cost’ in agitating for costing methods, and the implementation and application of the TA. Rhetoric, for discourse theorists, is a constitutive aspect of social reality, and is an important part of understanding and explaining social phenomena: “discourse theorists view tropological movements as an essential dimension of all social relations” (Howarth & Griggs, 2005, p. 10).

In rhetorical and linguistic terms, a ‘redescription’ names moves that change a concept in alternative respects, and includes several variants: reconceptualisation (a revision of meaning), renaming (a change of the name), re-weighting (a shift in significance) and re-evaluation (an alteration of the normative implication). In particular, this study employs the Quintilian rhetorical strategy of paradiastole, which refers to de-valuing or re-valuing the normative tone or the increasing or decreasing significance of the concept in question, to affect the ‘acceptability’ of a concept (Howarth & Griggs, 2005, p. 11). Quintilian’s *The Orator’s Education* provides advice on presenting factual narratives, particularly the role of the attorney in persuading a court of law. Quintilian describes the technique as the restating of facts:

but not all in the same way; you must assign different causes, a different state of mind and a different motive for what was done (Skinner, 2002, p. 183).

Of particular interest for DT is the substitution of a rival (yet neighbouring) evaluative term “that serves to picture an action no less plausibly, but serves at the same time to place it in a contrasting light”. Thus “you must try to elevate the action as much as possible by the words you use: e.g. prodigality must be more leniently redescribed as liberality, avarice as carefulness, negligence as simplicity of mind” (Howarth & Griggs, 2005, p. 11). For Quintilian:

the essence of the technique may thus be said to consist of replacing a given evaluative description with a rival term that serves to picture the action no less

plausibly, but serves at the same time to place it in a contrasting moral light. You seek to persuade your audience to accept your new description, and thereby to adopt a new attitude towards the action concerned (Skinner, 2002, p. 183).

However, for Quintilian, this is more than merely substituting one word for another:

“For no one supposes that the words prodigality and liberality mean the same thing; the difference is rather that one person calls something prodigal which another thinks of as liberality” (Skinner, 2002, p. 183).

Consequently, redescrptions are omnipresent in political thought and in the political use of concepts, which are commonly controversial and contested. Accepting this omnipresence as a condition for understanding political thought and conceptual change requires studying redescrptions. These should be, in principle, appreciated as signs of political creativity and innovation, even if it is impossible to predict what uses a particular redescription might eventually lead to. For Laclau and Mouffe, redescrptions play a significant role in the creation, maintenance, destabilising, and disruption of hegemony and democracy.

In the search for the employment of rhetoric, “discourse theorists need to guard against charges of textual and linguistic reductionism, and they need to deal with rhetorical forms at the appropriate levels of abstraction” (Howarth & Griggs, 2005, p. 10). The categories of rhetoric, metaphor, metonymy, and catachresis are important for the ontology of DT, as well as being a means of analysing textual and linguistic events. For the ontology of DT, hegemonic interventions are essentially a metonymical operation by which a “particular group takes up demands articulated by contiguous groups ... or extends one set of demands into adjacent spheres” (Howarth & Griggs, 2005, p. 11). Further, attempts to close systems could be metaphorical, as they involve the “creation of meaningful totalities via the disarticulation and replacement of previously existing formation” (Howarth & Griggs, 2005, p. 11).

Thus, the text of documents and interviews will be subject to rhetorical analysis, where the role of metonyms and metaphors operate at the ontical level, focusing on the employment of cost in telecommunications regulation. I focus on how the ontological dimension informs the employment and use of tropes in the analysis of discourse, examining the substitution of metaphors to understand the logic by which interested parties, telecommunications competitors, advocates (lawyers), regulators (Telecommunications Commission), and the Government and its agents, struggled to ‘create’ and ‘operationalise’ a workable framework, given the incentives of each player to ‘use’ the system for their own advantage.

3 *Empirical Analysis: Validity*

The logic of critical explanation seeks to understand the ontical interpretations of social actors at the social, political, and fantasmatic level. DT seeks to identify the nodal points and nuanced rhetorical strategies employed by different actors in constructing and sedimenting new discourses subsequent to disruptions and dislocations. This focus on subjectivity renders the use of coding and other technical linguistic analysis inappropriate, as they attempt to import ‘objectivity’ into the research process.

There is a strong experiential aspect to this research: first, my working background as a regulatory lawyer, and second, my active engagement with the research as a political actor. Both inform the research process. A personal benefit to this work is knowledge gained when I worked in this environment, working for Chapman Tripp, specialising in competition law and telecommunications regulation. Consequently, I have familiarity with organisations and institutions involved in this project, including:

- a) law firms (including Chapman Tripp, Russell McVeagh, Bell Gully, and Buddle Findlay);

- b) telecommunications companies (including Telecom, TelstraClear, Citilink, and Vodafone);
- c) regulatory institutions (the CC and the Telecommunications Commissioner);
- d) accounting professionals (including Price Waterhouse Coopers, Ernst & Young, KPMG, and Deloitte, as well as accounting expert witnesses); and
- e) other interested parties (Telecommunication Users Association of New Zealand [TUANZ], the Ministry of Economic Development, and interested economists and economic institutions).

On reflection, this experience provides invaluable background information, as well as helping to gain access to key sites. Equally, I am a political actor involved in the research process. This research represents my interpretation of the political environment surrounding the interface of law and accounting in the regulation of telecommunications. There are two key components, then, to this research. First, as the reader, you are invited to consider my empirically and theoretically grounded opinion of the interface of law and accounting. You may disagree; you may agree. Second, in terms of validity, my document analysis concentrates on the process identified in Chapter two derived from: the MIT establishment, terms of reference, the MIT issues paper, submissions, MIT draft report, submissions, counter-submissions, MIT final report, Government response to MIT report, Telecommunications Bill, First Reading, Second Reading, submissions to the Commerce select committee, select committee report, Third Reading and enactment of the TA. Hegemonically, the thematic analysis includes: 1) what rhetoric was employed by Government agencies? 2) How have interested parties responded to this rhetoric? 3) How have Government agencies and interested parties shifted their position?

To analyse the rhetoric of Government agencies, and to ensure a comprehensive data set, I collated all statements in respect of telecommunications regulation from the MIT, MED, CC, Government, and other agencies from 1995, as well as various

regulatory comments from 1987. This was then closely analysed for consistent themes, resulting in the identification of four themes at the social logic level in respect of TSLRIC and interconnection and two themes for net costing and the TSO.

There were three parts to the analysis of the responses of interested parties. First, there was a close reading of MIT and select committee documents. Upon identifying 'official' themes, I physically read the submissions to the MIT and select committee. The goal was to confirm the appropriateness of the general themes and gather evidence from submissions as to actual rhetorical arguments employed in relation to the themes, as well as identifying coalitions, partnerships, and strategic alliances between interested parties.

The data set for the first empirical question on the institution of TSLRIC and net costing in the TA 2001 consists of publicly available documents, including two sets of submissions by interested parties to the MIT (as identified in Chapter two), cross submissions, three reports of the MIT (Issues Paper, Draft Report, and Final Report), the Government response to the Final Report, submissions and reports submitted to the Commerce select committee, the Commerce select committee report, media releases, and Parliamentary debates on the Telecommunications Bill. This is supplemented by interview data, which primarily provided background information and helped to clarify political motivations for interested parties. The reports helped in the identification and analysis of the emergent themes and was supplemented by two documents: first, Arthur Andersen reviewed and summarised all submissions to the MIT (the discrepancy between what Arthur Andersen claimed to be stated in individual submissions and the text of the submissions themselves was intriguing); second, the Officials' Report on the Commerce select submissions, which summarised all the submissions received, and the themes, in relation to the actual contents and clauses of the Telecommunications Bill.

These themes were verified by interviewee responses. This resulted in over 2,000 pages of printed and photocopied material from the submissions about the use of cost.

In relation to the second empirical question concerning implementing and interpreting the TA 2001 and the employment of rhetorical strategies by interested parties in the implementation, application, and use of 'cost' and 'cost information' in the regulatory process, the smaller data set combined publicly available documents, supplementary interviews, and industry experience. Upon enactment, the Telecommunications Commission embarked on a learning process concerning TSLRIC and net costing and published a series of Commission reports and commissioned research. All this material was available on the CC's website. Following this initial learning process, the Commission published a set of preliminary frameworks for TSLRIC and net costing and invited submissions. These submissions and the Commission's Draft and Final Determinations are publicly available providing 1,500 pages of data for analysis. Similar analytical approaches were applied so as to identify themes and evidence of the themes, and interviews confirmed the veracity of the themes.

IV CONCLUSION

This chapter focused on articulating the Glynos and Howarth's logics of critical explanation as a methodological platform to consider the interface of law and accounting as constructed by the incorporation of costing as a central component of the telecommunications regulatory regime. In particular, this involved the characterisations of the social, political, and fantasmatic logics. The research methods employed to gather empirical material include interviews, document analysis, and an experiential element founded on personal experience as a regulatory lawyer. Finally, by considering

dislocation and rhetorical redescription, the chapter details the approach to data analysis. Key conclusions include:

- Empirical analysis in DT concentrates on the ‘concrete case’ as an opportunity to develop DT, as opposed to DT providing a set of theoretical tools to be applied to particular social settings. The key decision criterion with respect to DT and research methods is a question of commensurability. Given the focus on openness or the failure of closure (the negative ontology) and the highly articulated nature of DT, research methods may be incommensurate. There are alleged normative and methodological deficits within DT. First, Critchley (2004) criticises DT for failing to clarify if it focuses on description or critique, especially, as focusing on description risks emptying DT of any critical function. Second, Torfing (1998) challenges DT for providing ‘interesting’ redescriptions but failing to reflect on causality and explanation.

- Glynos and Howarth (2007) developed the logics of critical explanation as a methodological approach to the development of DT, as well as providing a response to the normative and methodological deficits within DT. There are five movements in the logics of critical explanation:
 - o Problematisation: a concrete empirical case in DT concentrates on a present problem, as opposed to technique or method-driven research that often constitutes positivist or normative research. Thus, the present problem examined is the contestation and institution of cost-based regulation (TSRLRIC and net costing) in NZ’s regulatory model for telecommunications.
 - o Retroduction: due to the limitations of induction and deduction, retroduction concentrates on identifying a social fact and then examining what gave rise to it. In short, this thesis concentrates on TSLRIC and net costing-based regulation as social facts, and then examines the political contestation surrounding institution and implementation.
 - o Social, political and fantasmatic logics:
 - Social logics examine the rules, practices, concepts, categories, and sedimented social practices that structure social interactions and relations. Management accounting research considers the rules and practices that make possible the reproduction of cost discourse.
 - Political logics consider the space in which the emergence, institution, and constitution of new norms, rules, and social practices are publicly contested. There are limited examples of this work in management accounting literature, but the focus of this study is on why TSLRIC and net costing were instituted as sedimented social practices during the contestation over the shape of the regulatory regime and then during implementation post the enactment of the TA 2001.

- Fantasmatic logics consider how subjects are ‘gripped’ by ideologies to allow social practices to continue. In particular, the focus of this inquiry is ‘what is it about cost (TSLRIC and net costing) that makes it so persuasive’?
 - Articulation: articulation is related to the identification of nodal points, which are privileged signifiers or reference points in a discourse. As an example, ‘cost’ becomes a privileged reference point in contestations over the shape of the new regulatory framework. Glynos and Howarth, partly as a response to Torfing’s criticism, argue that it is important to link the logics within their context in order to provide a coherent account to explain the single problematised phenomena. In this capacity, each chapter of this thesis constitutes part of the context, in relation to regulation, telecommunications, cost, the interface of law and accounting, and paradigmatic disputes within and between the disciplines.
 - Critique: given the focus on political and fantasmatic logics, there are many opportunities for critique. In particular, careful examination of the social, political, and fantasmatic landscape should identify moments of dislocation (leading to the institution of new social practices), penetrated by radical contingency. These, dislocatory moments make the ‘lack’ visible. This study concentrates on the identification and examination of multiple dislocatory moments.
- The thesis employed document analysis and interviews with a strong experiential element. For DT, document analysis is an important form of non-reactive, linguistic research data. In this study, all documents are publicly available and accessible. The study used focused, unstructured interviews, given their potential for greater qualitative depth and flexibility. Interviews constitute a form of linguistic, reactive research
 - The tools of data analysis employed include dislocation and rhetorical redescription. By examining how actors construct the debate around the nodal point of ‘cost’, the empirical questions lend themselves to the DT notion of dislocation. In particular, I seek to examine how interested actors succeeded in sedimenting TSLRIC as the new regulatory practice in interconnection and net costing for the TSO. Equally, the empirical questions examine rhetoric, and how actors articulate the metaphorical element of ‘cost’ in the agitation for costing methods, and in the implementation and application of the TA 2001.

Thus, this study examines meanings attached to accounting information in its construction, development, presentation, contestation, argument, and in the decision making process. Cost is an ontic tool, as there are different costs for different purposes. Finally, the act of application (determining the cost to apply to a particular situation) is an articulatory practice, which is a rhetorical technique. This is the interface of DT at

the interface of law and accounting. In relation to the re-regulation of telecommunications, this thesis investigates the formation of political identities characterised by antagonism and uncertainty at numerous levels, including the discursive enunciation of standpoints and perspectives by actors at the first instance, and then considers the micro-politics at the level of reception post the enactment of legislation by analysing the contestation over interpreting and implementing the regulation.

- Chapter Seven -

Empirical Data and Analysis: TSLRIC Pricing and Net Costing of TSO

I CHAPTER SEVEN OVERVIEW

Chapter six introduced the logics of critical explanation as a methodological approach to consider the complexity of telecommunications re-regulation. This empirical chapter explores the dichotomy between the ‘simplistic’ story of a new regulatory framework (as presented by media and Government agencies) and the multiple layers of contestation in the re-regulation stages: from problematising light-handed regulation, to disputing the nature of the new framework, through to contestation over the institution and implementation (as identifiable in public documents) of TSLRIC and net costing as legislated in the TA 2001. Equally, at the interface of law and accounting, there is the dichotomy between the legal framework’s adoption of the ‘simple, objective’ cost as a central regulatory tool and the multiple layers of contestation over cost at the technical, methodological, and political levels and the lack of recognition of problems associated with cost and costing including arbitrariness, choice, subjectivity, politics, conflict, and the social and institutional creation of meanings of cost (as discussed in Chapter three). The basic re-regulatory story is deceptively simple: political parties acknowledged serious problems with telecommunications under the ‘light-handed regulatory’ system; the newly elected Government established the MIT to recommend telecommunications regulatory changes; the Government agreed with most of the MIT recommendations (detailed in Chapters two and three); the TA 2001 became law requiring TSLRIC for interconnection pricing and net costing for the TSO; and the Telecommunications Commissioner commenced implementing the Act. However, in contrast, Chapter five developed three figures, Figures 5.1, 5.2 and 5.3 to illustrate the complexity and scope for contestation throughout the ‘re-regulatory’ phases. In particular, the causes of the

failures of the light-handed regulatory system were disputed and ranged from the dominant incumbent to the CC to the judicial process to the regulatory framework itself. Equally, in relation to the institution of TSLRIC for interconnection pricing and net costing for the TSO, there was dispute over the appropriateness of a cost-based pricing mechanism, the form of cost-based pricing regulation, and the relationship of the TSO to interconnection. Finally, in relation to interpreting and implementing the TA 2001, there was dispute as to the approach, modelling, meaning, and calculation of both TSLRIC and net costing. Thus, the analysis identified various parties interested in the objectives and shape of the regulation,¹¹¹ contestable regulatory frameworks, various costing methodologies and methods, and different strategies, effects, and aims of interested parties in articulating, implementing, and developing the regulation. Consequently, the chapter returns to the two empirical questions:

- a) Why did TSLRIC, a cost-plus pricing model, for interconnection, and net costing for the TSO become the basis for regulating telecommunications in NZ? How did actors discursively construct their political identities in relation to cost?
- b) How and why were the ‘rules of regulation’ encapsulated by the TA implemented and introduced focusing on how cost accounting information was used in the regulatory process by accountants, lawyers, and regulators? How was ‘cost’ employed rhetorically in interpreting and implementing the TA 2001?

The social, political, and fantasmatic logics, illustrated in Chapter six, provide a framework to interrogate the phases in re-regulating telecommunications, as well as examining the re-regulatory process as a whole.¹¹² Chapter two examined two aspects of the first phase of re-regulation, by illustrating the genealogy of telecommunications

¹¹¹ See Appendix 5 for a full list of submissions to the MIT and the Commerce select committee.

¹¹² This chapter examines the rhetoric and agitation in institution and implementation, thereby illustrating how TSLRIC and net costing came to represent the failures of light-handed regulation. Chapters two and three illustrated how the light-handed regime raised interconnection issues, due largely to the *Telecom v Clear* litigation and Telecom manipulating the interconnection price by charging KSO costs. Consequently, in the institution and implementation of TSLRIC (resolving interconnection pricing) and net costing (resolving KSO and interconnection pricing manipulation), there is a degree of ‘repetition’ in the analysis as the political rhetoric employed by interested parties tended to overlap as parties represented the issues as connected

regulation in NZ and the influence of economic theory on the application and development of different regulatory frameworks. This characterised the complex failure of the light-handed regulatory system from economic, legal, social, and political perspectives, and problematised the political management of competition law, the state of telecommunications in NZ, and Telecom's pseudo-regulatory role. Chapters two and three identified the Government's response to the failure of 'light-handed regulation', by detailing the shift to sector-specific telecommunications regulation, and by recognising the institution of cost-accounting as a core component of telecommunications regulation. Chapter three argued that this provided a significant challenge for effective legal regulation by identifying cost accounting information's centrality at technical, methodological, and political levels and demonstrating the socially constructed, arbitrary, and subjective nature of costing. In short, the sub-text of Chapter three is that the TA would be incredibly complex to interpret and implement, due to the range of 'political' strategies that interested parties could employ in contesting 'cost' within the regulation. Chapter seven builds on the empirical and theoretical discussion by examining contestation at the 'institution' and the 'implementation' phase. At the institution phase, the focus is on examining how TSLRIC interconnection pricing and net costing for the TSO became the regulatory approach within the TA, whereas, the thesis concentrates on the contestation over the implementation and interpretation of TSLRIC and net costing at the implementation phase.

This empirical analysis divides into three parts. Part I employs retrodution to examine how TSLRIC interconnection pricing and net costing for the TSO became regulatory approaches in the TA,¹¹³ i.e. central regulatory drivers. This Part examines what gave rise to the facts of TSLRIC and net costing (in social logics, the social

¹¹³ As explained in Chapter six, retrodution concentrates on identifying a social fact and then examining what gave rise to the social fact. It is opposed to deduction and induction.

landscape of telecommunications regulation is characterised by TSLRIC and net costing), concentrating on political contestation over the sedimentation of TSLRIC and net costing, at the expense of alternative approaches (political logic). The rhetorical analysis examines how TSLRIC and net costing were articulated within the discourse focusing on signifiers attached to TSLRIC and net costing and how these signifiers shaped the ensuing contestation over the content of the TA 2001. This analysis draws on DT concepts of dislocation, articulation, rhetoric, deconstruction, genealogy, condensation, overdetermination, hegemony, relations of equivalence and difference, and nodal points. Part II examines how the Telecommunications Commissioner implemented and interpreted the processes of the TA and the political contestation over TSLRIC and net costing. This also involves rhetorical analysis, as TSLRIC and net costing constitute the social space. However, the social space is not fully articulated as the Government legislated TSLRIC and net costing in name only, providing little guidance or detail on how these concepts were to be interpreted and implemented. Consequently, there remains room for political contestation over the approach, modelling, meaning, and calculation of these cost concepts. This invokes two levels of rhetorical analysis: first, interested parties articulate and agitate specific meanings of TSLRIC and net costing for regulation purposes; and second, these common condensed signifiers (presented in Part I of the empirical analysis) are displaced in the contestation over implementation. Finally, Part III, a form of auto-critique, employs fantasmatic logics to explain and critique how political actors were 'gripped' by certain ideological presuppositions of 'costing'. The contestation that marks the process of institution, implementation, and interpretation exposed the elements of subjectivity, judgment, arbitrariness, choice, information asymmetry, and politics inherent within the costing process. In DT terms, this exposed the 'radical contingency' of both TSLRIC and net

costing. However, the ideologies identified within the empirical analysis of Part I and II help smooth over and cover the radical contingency of the regulatory framework.

PART I: RETRODUCTION: DISLOCATION AND ARTICULATION

In following Glynos and Howarth's logics of critical explanation, I employ retroductive logic. This requires the observation of a fact and investigating what gave rise to it (Sayer, 1986, p. 116). Chapter three demonstrated the centrality of cost in the TA. For retroduction, TSLRIC interconnection pricing and net costing of the TSO are 'facts' in telecommunications regulation. Thus, Part I examines attempts by political actors to articulate a 'new' discourse, i.e. how actors construct nodal points around 'cost'. Equally, the empirical analysis focuses on how actors rhetorically articulate the metaphorical element of 'cost' in the agitation for costing methods: Part I investigates the formation of political identities characterised by antagonism and uncertainty at numerous levels, including the discursive enunciation of standpoints and perspectives by actors in relation to 'cost' and the institution of the telecommunications regulatory environment.¹¹⁴ In particular, this examines dislocatory moments by which cost came to represent a way forward from light-handed regulation (as depicted in Chapter three), how 'cost' rhetorically came to represent an 'answer' to regulatory failings of light-handed regulation (specifically, TSLRIC and net costing), the hegemonic incorporation of criticisms of TSLRIC and net costing and alternative regulatory approaches through the logic of difference, and how TSLRIC and net costing were 'emptied' of specific

¹¹⁴ The analysis recognises the extended consultation process. In this, time plays a role in the construction of nodal points. To recognise the impact of time, there are two boundaries within the empirical analysis. First, the MIT commenced when the Government released the terms of reference on February 2000 and the concluded with the presentation of the Final Report in September 2000. The "Parliamentary process" captures the time from the release of the MIT's Final Report through to the Government enactment of the TA in 2001.

content so as to represent a broader ‘answer’ to the regulatory issues through the logic of equivalence.¹¹⁵

A “*Ideological Cover*”

Chapter two depicted the increasing public and political disquiet about Telecom and telecommunications up to the 1999 General Election particularly concerning high ‘monopoly’ profits, slow technology ‘rollout’, and ‘light handed regulation’ (Patterson, 1998, p. 148). The Labour Party campaigned deftly, promoting change in telecommunications, without necessarily articulating the shape or scope of that reform. The Labour Party’s general strategy of ‘responsible re-regulation’ championed change in pursuit of consumer benefits and industry efficiency. Patterson argues that this was a successful strategy that played on the negative public perception of the telecommunications industry (1998, p. 138). However, election campaigning demonstrated marked disagreement over the ‘best’ regulatory regime. Thus, in a landscape characterised by public discontent with Telecom, the newly elected Labour-led coalition Government had a political mandate for change in telecommunications, but there remained an element of ‘uncertainty’.¹¹⁶ Howarth and Griggs argue:

For various reasons, many governments in liberal democratic societies, even those with large parliamentary majorities enjoying considerable popular support, are often reluctant to pursue public policies they think are desirable and justifiable. The fear of a media backlash, the threat of intense political protest, the importance of a particular set of constituencies, or just a generalised cautiousness, may conspire to impede the adoption of programmes that from an external perspective seem inevitable (Howarth & Griggs, 2007, p. 23).

After nine years in opposition, uncertainty could have intensified for the newly elected government. But note the paradox: the Government had popular support for industry change, but uncertainty surrounded the ‘appropriate’ form of change and the ‘newness’

¹¹⁵ Chapter five identified that the ‘logic of equivalence’ was a discursive strategy to collapse differences within a discursive system, by constructing different identities as being linked and even identical. The more extended a chain of equivalence, the less content is attached to the empty signifier.

¹¹⁶ Note that “change in telecommunications” was one of Labour’s pledge card promises in the 1999 Election.

of the Government (Howarth & Griggs, 2007, p. 23). Thus, the Government chose to circumvent the paradox by shifting the focus, in the interim, to an ostensibly independent government agency by creating an ‘independent’ MIT.¹¹⁷ The government sought ideological protection in delivering the election promise of telecommunications change from a mere five months earlier, but diverted media and other public attention from itself to the MIT by requiring the MIT to investigate and recommend what form of regulation should be introduced.

As Chapter three illustrated, in establishing the MIT the Government focused on the ‘communications revolution’ and was careful not to blame the ‘light-handed regulatory’ system or Telecom for the stunted development of competition in telecommunications. There are two important points: first, the previous Labour Government (the Fourth Labour Government) instituted the original light-handed regulation; and second, as Ergas comments, successive Governments had “staked substantial political capital on the virtues of the regulatory regime” (1995). Therefore, Labour did not wish to lay blame (as it created the original regulatory regime). In rhetorical terms, the Government shifted the focus from regulatory failure to the need for developing a vibrant, competitive telecommunications environment and tied this to the ‘critical need’ for telecommunications participants to interconnect fairly and efficiently with existing networks.

However, this should not be interpreted as a situation where the Government had no ‘clue’ as to the best regulatory direction. Indeed, they appeared to have a clear set of regulatory goals, but opted for the MIT’s ideological cover to pursue their desired regulatory goals:

¹¹⁷ Note that in NZ, the NZ Labour Party is traditionally conceived as the peoples’ party, particularly in relation to workers, and thus, the use of Ministerial Inquiries is a traditional Labour approach to regulatory change. It is seen as a way of guaranteeing a mandate.

- 1) In the MIT's broad terms of reference, the Government provided specific directions for areas that 'required' investigation: e.g. the *Telecom v Clear* interconnection dispute and the judicial approval of the "Baumol-Willig" rule concerned the Government (MED, 1999). Hence, the Government's terms of reference for the MIT required "investigat[ing] and ... comment[ing] on ... the environment for telecommunications network access and interconnection". Given increasing public disquiet about telecommunications, this sends two messages: a) the existing interconnection system was unfair and inefficient; and b) it was important that regulation provided for a better interconnection system (Gilbertson, 2001, p. 5); and
- 2) In relation to the TSO, the Government had a plan in mind. There was very little public and political contestation over the KSO process. The MIT considered the best regulatory arrangements for the KSO and recommended maintenance of the status quo, arguing against any regulatory cost recoupment mechanism. Most interested parties supported this. However, the Government thought differently arguing that the TSO clouded interconnection agreements and pricing, and instituted a regulatory mechanism separately accounting for the cost of the TSO, with the right for Telecom to independently recoup a proportion of the cost of satisfying the TSO.

However, the Government was careful not to appear to unduly curtail the MIT, by giving the MIT the appearance of openness with unfettered discretion to consider NZ telecommunications regulation: the Government emphasised that the MIT's process was open, and pointed out that the MIT would recommend, what, in the MIT's opinion was the best model for regulation. As Howarth and Griggs argue, this provided the Government with some ideological cover for their regulatory intervention while drawing media and public attention away from itself to the MIT.

Thus, the ideological cover generated by creating the MIT afforded the Government a level of comfort. The initial articulation of 'appropriate' regulation was to occur in an 'independent' forum where first attempts by interested parties and the MIT to articulate appropriate telecommunications regulation are encountered. Two levels of logic are at play: public contestation and constitution of approaches to interconnection and the KSO issues (political logic); and interested parties articulating

the social meaning of TSLRIC and net costing by characterising the practices and concepts of TSLRIC and net costing (social logic).

1 Articulating the Social Logic of TSLRIC

The MIT played an important role in curtailing potential contestation. Despite the open terms of reference, the MIT's Issues Paper (the first comment on the terms of reference) limited and shaped the ensuing discussion: e.g. the MIT introduced 'cost' and 'robust' as two concepts that shaped the debate (MIT, 2000b):

- 1) The MIT highlighted the difference between NZ's approach to interconnection regulation and 'common' international models and focused on the 'inefficiencies' of the current interconnection practice, referring in depth to the *Telecom v Clear* dispute and the "Baumol-Willig" rule. The MIT made specific note of the Government's dislike of the "Baumol-Willig" rule. This reinforced NZ's 'light-handed' approach as an aberration, which resulted in the "Baumol-Willig" pricing rule distorting interconnection.
- 2) The MIT stressed the broad range of potential options available by canvassing the range of interconnection agreements in use, including payments for terminating and originating calls, bill and keep; revenue sharing, wholesale prices; and cost-based interconnection access.
- 3) The MIT commented that there was "widespread international agreement" that forward-looking cost-based interconnection pricing was the best regulatory measure (MIT, 2000b, p. 18). Thus, while recognising that various interconnection mechanisms (such as 'bill and keep', revenue sharing, or wholesaling) existed, the reference to widespread international support for the 'international best practice' cost-based methods narrowed the interconnection debate to cost-based methods.

Thus, from a political logic perspective,¹¹⁸ these movements by the MIT limited and shaped public contestation around interconnection. In invoking the imagery of 'forward-looking cost as possessing widespread international support' the MIT restricted the space for the emergence and institution of different types of interconnection pricing rules. The ostensibly 'open' MIT quickly limited the range of arguments, determined subsequent discourse, and marginalised competing representations of appropriate regulatory interventions. The next section investigates

¹¹⁸ Political logics consider the space in which the emergence, institution, and constitution of new norms, rules, and social practices are publicly contested.

how interested parties formed political identities and discursively enunciated their position with respect to TSLRIC and the institution of the new telecommunications regulatory environment.

The regulatory requirement for an interconnection access regime was widely accepted. The major arguments concentrated on how and why TSLRIC provided the best methodology for pricing interconnection. TSLRIC, though, is tendentially empty of particular content: as Chapter three recognises, it is a costing method in name only – its specifics and methodological measurement develop in application. Hence, the empirical analysis identifies technical, methodological, and political TSLRIC arguments. Four primary nodal points thematise the social logics of TSLRIC: claims it was international best practice; robust; transparent; and not the ‘Baumol-Willig’ rule. Being tendentially empty of particular content, the signifier ‘TSLRIC’ encouraged interested parties, regulators, and the Government to read in various signifieds into the master signifier. In rhetorically analysing the submissions and reports, interested parties made a series of claims as to what TSLRIC represents. In particular, the signifier, ‘Baumol-Willig’ came to represent the most important (in correcting the past failings of light-handed regulation) and significant (in representing the degree of change brought by the move to TSLRIC) ‘meaning’.¹¹⁹ Thus, Figure 7.1 illustrates the range of signifieds condensed into the single signifier representing TSLRIC.

¹¹⁹ See Chapter two for more detail for details of the Government distancing the TA from the influence of the *Telecom v Clear* case.

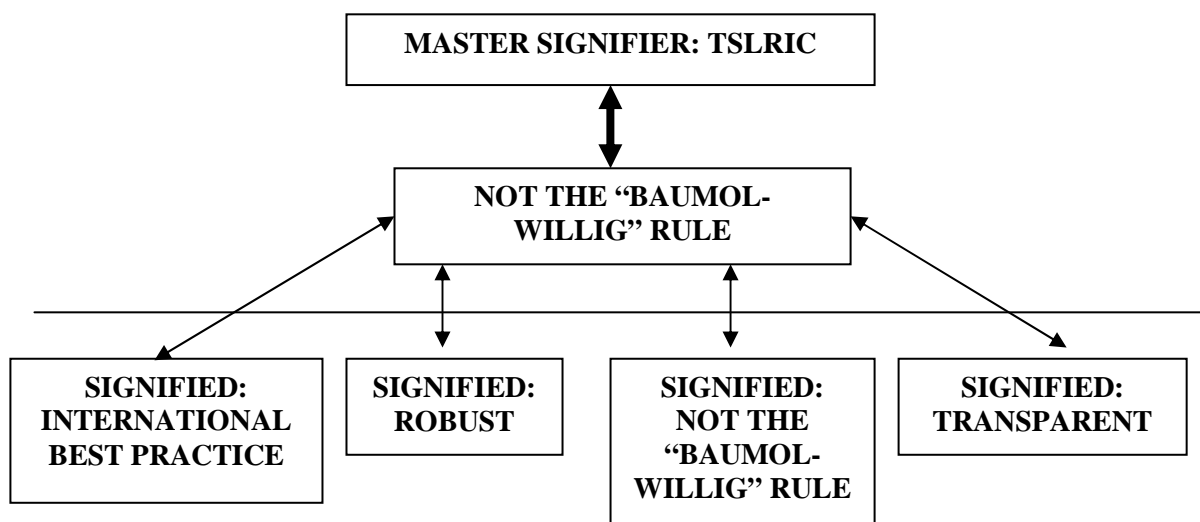


Fig 7.1: Multiple signifieds attached to the master signifier TSLRIC

Figure 7.2 illustrates the dual signifying function of the “Baumol-Willig” signifier as explained above, in that it rhetorically came to signify the failure of the light-handed regulatory regime and the movement to TSLRIC.

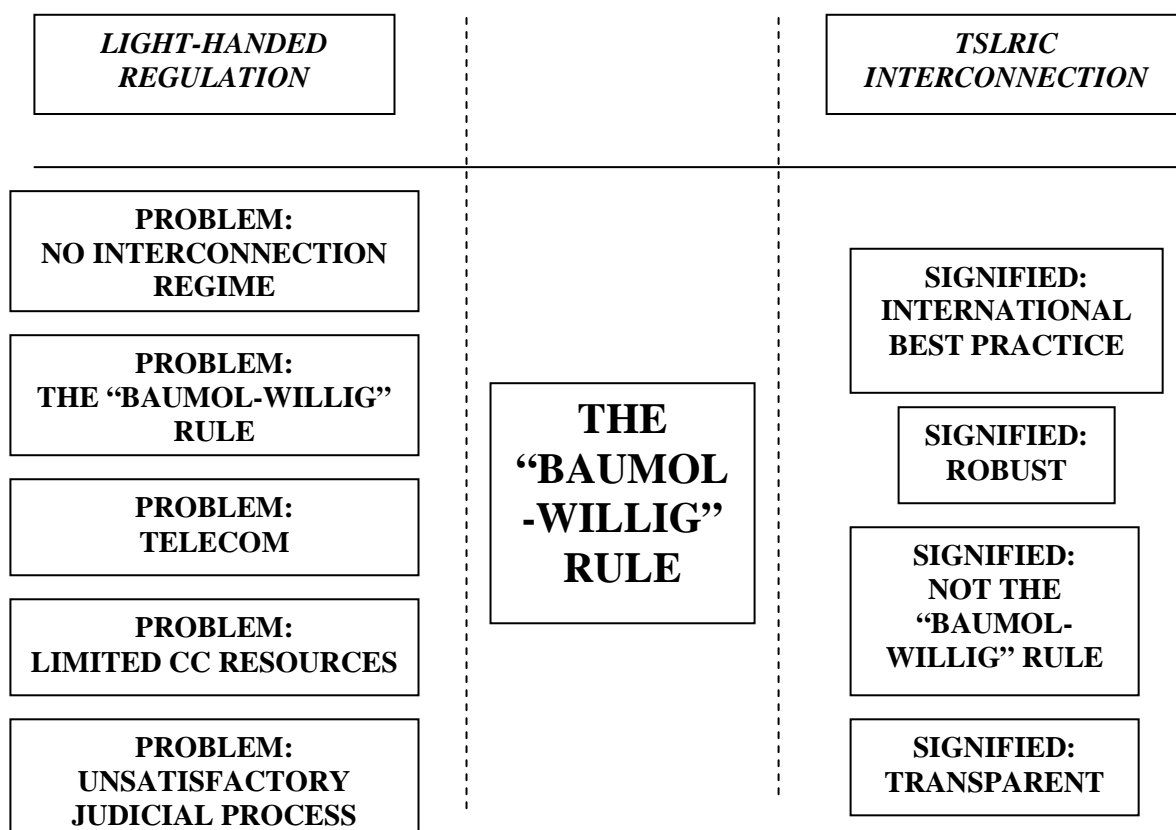


Fig 7.2: Dual signification: TSLRIC and the failure of light-handed regulation

Consequently, the ensuing analysis examines the politics of the consultation process as interested parties, including industry players, the Government and its agents formulated

the discourse around themes attributed to ‘TSLRIC’ for interconnection; and the contextualised and conflictual nature of this thematic presentation.

CLAIM 1: TSLRIC AS INTERNATIONAL BEST PRACTICE

As Laffont and Tirole acknowledge, NZ’s approach to regulating telecommunications was both unique (no other jurisdiction regulated telecommunications similarly) and extreme (in relying on general competition law in a developing market) (2000, p. 34). Consequently, there was marked separation between NZ’s ‘light-handed’ regulation and the international norm (where an independent regulator governed interconnection access and pricing through forward-looking cost-based interconnection).¹²⁰ In particular, CLEAR and the MED pointed to the light-handed regime being problematic, while the Te Horo Telecom Users Group, TUANZ, and the MIT saw its failure to provide a detailed interconnection access regime as especially problematic. The MIT aimed to provide a ‘solution’ to the interconnection problem and land a significant blow to the “Baumol-Willig” influence that tainted interconnection negotiations. Thus, the MIT focused debate on ‘acceptable’ cost-based regulation according to international ‘best practice’:

There is, today, widespread international agreement that interconnection prices are most economically efficient if they are based on costs and are forward-looking (MIT, 2000c, p. 18).

However, internationally, there is disparity over the ‘best-practice’ cost-based regulatory model, and thus, there was considerable debate before the MIT on what constituted ‘best practice’ cost-plus pricing rule: international benchmarking, bill and keep, or TSLRIC. For many interested industry players, the accepted cost-based pricing methodology mattered. In short, ‘bill and keep’ would provide the simplest and cheapest interconnection access for industry players, as it is based on reciprocity and

¹²⁰ See Chapter two for further details on international best practice regulatory models in telecommunications.

network equality.¹²¹ International benchmarking would remove many information collection challenges for the regulator, and focus industry dispute on what constitutes a similar telecommunications market. Equally, many industry parties submitted for TSLRIC interconnection pricing, as this was the most common methodology employed in telecommunications.¹²² What is intriguing about the use of the ‘best practice’ signifier at the MIT level is that each pricing principle considered and recommended (TSLRIC, bill and keep, and international benchmarking) were referred at some stage to being ‘best practice’ (by interested parties and the MIT). Consequently, it is difficult to delineate the label ‘best practice’. However, it does constitute an attempt to ‘sediment’ TSLRIC as ‘the’ social practice, by referring to other social contexts: if the majority of other jurisdictions accept TSLRIC as the best approach, then NZ should reflect that.

The notion of TSLRIC as ‘best practice’ resulted in several submissions strongly supporting the introduction of ‘forward-looking’, long-run incremental costing (e.g. see Federated Farmers, TUANZ, IHUG, CLEAR, Don Wallace and Associates, and eVentures). The Te Horo Telecom Users’ Group focused on tying cost-based regulation to the prime issue of interconnection and competition:

The key issue for most New Zealand consumers is the questions of competition on the local loop ... one way [to allow fair competition] would be to adopt a situation similar to that which operates in the United States where local loop owners are required by regulation to allow competitors to use the lines at the true cost of providing that service (Te Horo Telecom Users’ Group, 2000, p. 3).

Te Horo Telecom Users’ Group had been locked in a bitter dispute with Telecom throughout the 1990s concerning local call access. Te Horo is a small area in the lower

¹²¹ For a new entrant, network equality and reciprocity with Telecom, technically, would lead to a price where the new entrant would pay Telecom the difference in network traffic, based on a ‘marginal cost’ equation (without any cost of capital included). Note that bill and keep is a pricing scheme for two-way interconnection between two networks under which each network agrees to terminate calls originating from another network at no charge. See Chapter two for further details.

¹²² Countries implementing a form of LRIC included: the UK, Australia, Hungary, Ireland, Sweden, South Africa, the USA, Germany, Hong Kong, Spain, Denmark, Italy, France, Belgium, Brazil, Switzerland, South Korea, Peru, the Netherlands, Greece, Mexico, Austria, Romania, and Portugal (PWC, July 2003, pp. 21).

North Island. Unfortunately for Te Horo residents, all telephone calls to major towns and city centres in the vicinity of Te Horo were charged as a toll call. Under the original KSO arrangement, free local calls are guaranteed, but due to Telecom's local call boundaries, Te Horo had a very small local call zone. Through the 1990s, the Users' Group supported any attempts to increase telecommunications competition, actively agitated against Telecom, and sought Parliamentary intervention. Thus, given the increasing propensity for US telecommunications operators to discard 'local call zones', the US approach was favoured by Te Horo. Similarly, CLEAR reinforced their support for TSLRIC:

There is near universal acceptance that TSLRIC is the most appropriate pricing principle for fixed interconnection services provided by an incumbent operator and that it provides the clearest economic signals for efficient investment (CLEAR, 2001, p. 7).

CLEAR unsurprisingly favoured the shift to TSLRIC as they suffered the most under the light-handed regime, illustrated in their litigation experiences with Telecom through the 1990s. Given the Privy Council decision in *Telecom v Clear*, it is unsurprising that CLEAR would support a substantive shift from the influence of "Baumol-Willig". However, during the litigation, CLEAR supported a 'bill and keep' pricing methodology as it provided the cheapest interconnection access for a developing competitor (Carter & Wright, 1999, p. 2). However, CLEAR now supported TSLRIC. Why? CLEAR's market position was now substantially different (as the second largest industry player with approximately eight per cent market share). Network investment provides a core reason for CLEAR's support of the shift to TSLRIC: during the 1990s and early 2000s, CLEAR invested heavily in local networks in the central business districts of Auckland and Wellington (and Christchurch, to a smaller extent). Consequently, as the owner of competing networks in three large city centres, CLEAR's support of TSLRIC envisages the scenario where industry competitors would seek interconnection access to CLEAR's network. TSLRIC provides a better return on

their network investment as they would receive a ‘cost of capital’ component in the access charge not available under a ‘bill and keep’ scenario.

There is an interesting dichotomy in submissions on whether TSLRIC constituted best practice. With the exception of CLEAR, all TSLRIC submitters were small, local new entrant industry players (including IHUG, and eVentures) or industry pressure groups (including Federated Farmers, TUANZ, and the Te Horo Telecom Users’ Group). However, interested parties with direct TSLRIC experience in different jurisdictions (including the US, Australia, and Europe), all submitted that TSLRIC was difficult to institute (see Telecom, TelstraSaturn, Vodafone, John Small, and Nortel Networks). In particular, Vodafone was heavily critical of TSLRIC pricing pointing to several limitations from international experience. They argued that given the range of choices inherent to TSLRIC, each jurisdictional model was ‘so’ different that it was impossible to consider TSLRIC international best practice (2001, p. 41). Similarly, TelstraSaturn drew on ‘significant difficulties’ encountered by its parent company, Telstra in the Australian implementation of TSLRIC-based regulation, concerning information asymmetry and for regulatory gaming (2000, p. 15). That TelstraSaturn challenged TSLRIC is intriguing as the regulatory gaming and information asymmetry matched Telecom’s allegations against Telstra in Australia (through its Australian investment AAPT): perhaps TelstraSaturn did not wish to face the opposite side of the ‘TSLRIC coin’ in NZ. International experience of TSLRIC, while economically the best practice model for telecommunications regulation, demonstrated that it was a difficult regulatory model to implement and control.

Despite this contestation, the MIT’s Final Report concluded that TSLRIC was international best practice, recommending it for interconnection access (2000b, p. 65). The Government agreed. TSLRIC as ‘best practice’ was a contested nodal point (a

privileged signifier) in the interconnection access debate.¹²³ However, this ‘signifier’ played a significant role for Government. Given the uniqueness of the ‘light-handed’ approach, the right to claim TSLRIC as international best practice (despite contestation) because various international jurisdictions considered it the best regulatory approach gave important ideological cover to the MIT, the Government and its agents. Ideological protection was unavailable under the light-handed approach as it was ‘experimental’. Equally, as this was the international approach, any future regulatory failure would not be the Government’s fault. Similarly, the need for a ‘robust’ interconnection pricing methodology became an important signifier for interested parties as is demonstrated next.

CLAIM 2: TSLRIC AS ROBUST

TSLRIC costing was presented as “robust”. Robust is a complex word, but in the analysis of the submissions, the institution of a ‘robust’ TSLRIC interconnection methodology represented the failure of light-handed regulation. In particular, the invocation of image of TSLRIC as robust rhetorically constructed the light-handed regulatory model as weak, particularly through failing to designate an interconnection regime, to prescribe an interconnection pricing methodology, or to provide an appropriate dispute resolution forum (due to the Privy Council decision in *Telecom v Clear*). However, it is difficult to reconcile what is ‘meant’ by ‘robust’. Figure 7.3 illustrates various concepts attached by interested parties to ‘robust’. These are competing interpretations of the hegemonic statement, ‘TSLRIC as robust’, and included claims that TSLRIC was ‘solid’, ‘appropriate’, ‘real’, ‘fair’, and ‘accurate’. Equally, some submissions identified ‘TSLRIC as robust’ with a regulatory object: i.e.

¹²³ A nodal point is a ‘privileged’ signifier, which attempts to partially fix a discourse by offering a potential ‘universal meaning’. It is precisely the attempt at partial fixation or centring of a discourse, which binds together ‘chains of equivalence’.

TSLRIC provided a robust methodology, a robust regulatory environment, or a robust measurement.

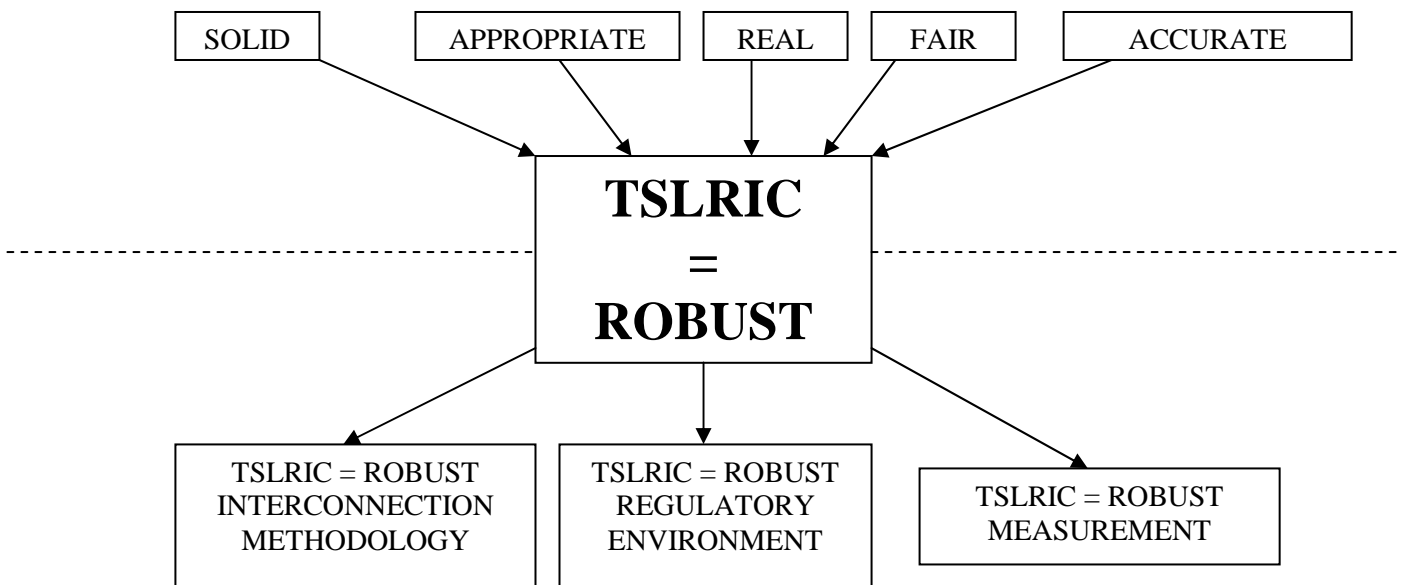


Fig 7.3: Articulation: The multiple meanings of TSLRIC as ‘robust’

Figure 7.3 demonstrates that ‘TSLRIC as robust’ is a floating signifier, empty of particular content.¹²⁴ Interested parties, regulators, and the Government read in various ‘definitional’ signifieds, condensed into the single signifier ‘robust’. TSLRIC was represented as ‘solid’ by the MED and IHUG (2001, p. 22; 2000, p. 8), ‘appropriate’ by Web InterNet (2000, p. 1), ‘fair’ and ‘real’ by TelstraSaturn (2000, p. 10), and ‘accurate’ by IHUG (2000, p. 8). Similarly, the MIT and David Cunliffe referred to TSLRIC providing a more ‘robust’ regulatory environment (Hansard, November 27, 2001). IHUG argued that TSLRIC provided a robust interconnection methodology (IHUG, 2000, pp. 7-8), and the MED stated that TSLRIC would measure ‘solid’ interconnection access prices (MED, 2001, p. 23). It is difficult to comprehend what interested parties meant by arguing that TSLRIC was ‘robust’, without considering their intentions. IHUG, an ISP, required access to Telecom’s PSTN for dial-up Internet. IHUG, and other ISPs, advocated through the mid-to-late 1990s against Telecom as

¹²⁴ As Chapter five explains, a floating signifier attempts to name the lack in a social system. In this example, ‘robust’ as a concept appears to empty of particular content, as interested parties are able to read in a complex mix of particular contents into the signifier, ‘robust’.

Telecom: a) required ISP customers to use a special number to access the network (0869); b) charged ISPs an ‘expensive’ interconnection fee (see Gilbertson, 2001, p. 3); and allegedly delayed infrastructure investment and technological rollout (Paterson, 1998, p. 5). Consequently, in reaction to this treatment by Telecom, IHUG and other ISPs agitated for an interconnection methodology like TSLRIC. In particular, IHUG associated the introduction of ‘robust’ interconnection pricing with two outputs: ‘accuracy’ and a solid costing structure:

IHUG believes that at [sic] a per-minute interconnection charge causes distortions in the telecommunications market because it does not reflect the true cost of providing interconnection services. This, in turn, encourages game-playing and arbitrage by service providers ... interconnection charges should be regulated to reflect as closely as possible the cost of providing interconnection services ... any differences in price will be a reflection of bargaining power, not cost.

...

This game playing has been encouraged by the failure of the interconnection agreements to reflect the economic cost of providing call termination services.

...

IHUG considers that introducing an interconnection regime which more accurately represents the cost and cost structure associated with interconnection services will reduce game playing and costly court battles (IHUG, 2000, pp. 7-8).

For IHUG, TSLRIC was a robust methodology providing ‘true cost’, as it reduced Telecom’s regulatory games or arbitrage ability. As Figure 7.3 indicates, the ‘robust’ signifier implicated ‘fair’ and ‘appropriate’. These relate to the interconnection experience under the light-handed regime, where Telecom and an interconnecting party would negotiate access pricing.

However, Vodafone and the Business Roundtable challenged the presentation of TSLRIC as ‘robust’ as depicted in Figure 7.3. Vodafone challenged TSLRIC as a robust cost measurement system due to the need for expert judgement, the difficulty of cost allocation, and the challenge of timeliness:

Second, cost-base pricing involves the allocation of costs. As a significant proportion of the costs of telecommunications networks is common to many services, allocation of these costs to any particular service is somewhat arbitrary. Regulators do not have the information to determine the efficient allocation of common costs ... Lastly, cost-based pricing requires the regulator to make a range of judgements. In determining a cost-based price the regulator must decide what costs to include, how to value assets, the cost of capital, etc. As each of these

decisions are debatable and can have a large effect on the outcome, parties devote significant resources to influence these judgements (Vodafone, 2000, p. 42).

As indicated above, its international experience with TSLRIC resulted in Vodafone heavily criticising TSLRIC pricing: Vodafone's experience as an access seeker and access provider in international jurisdictions makes this submission interesting. The Business Roundtable, from a strong anti-interventionist position, criticised TSLRIC for being openly political, arguing that telecommunications costing was especially difficult, due to the existence of common and joint costs, the challenge of isolating relevant costs, and the regulatory challenge of trying to understand the information presented to them:

In our view it is very important that regulators and the regulated resist the incessant pressures to politicise prices and investment decisions in telecommunications.

...

The Commissioner will not be competent to evaluate disputes between experts and will not be independent as they will not be indifferent to the effect of any decisions on their own role. In any case, neither the views of experts nor regulators should carry the day (NZ Business Roundtable, 2000, p. 10).

From an 'anti-interventionist' perspective, the Business Roundtable acknowledged the challenges of 'robust' costing in the regulatory environment.

In a report to the Government, the MED conceded the need for judgment in exercising TSLRIC, but played this down, commenting that:

In assessing efficient costs the regulator usually:

- Values the network at the cost of the technology that would need to be deployed today to efficiently provide the required level of service
- Includes a reasonable (risk-adjusted) rate of return on the value of the equity held in the network (as determined by the value of the network and an appropriate level of debt financing)
- Includes a contribution to the common costs (e.g. management overhead) of operating the wider telecommunications network (MED, 2001, p. 27).

This underplays the extent of judgment required in TSLRIC (Laffont & Tirole, 2000, p. 143), but constitutes an attempt to deflect Vodafone and the Business Roundtable's criticism. In DT terms, this is the logic of difference.¹²⁵ As Chapter five explains, this is

¹²⁵ See Chapter five for more details.

a discursive strategy to incorporate oppositional signifiers into a nodal point (robust) in order to expand the order and dispel the opposition. Vodafone and the Business Roundtable attempted to disrupt the ‘TSLRIC as a robust’ signifier by criticising its degree of judgment and discretion. However, in acknowledging but downplaying this, the Government effectively silenced the critique, and indeed incorporated the criticism within the signifier of TSLRIC as ‘robust’. Equally, the Government “dissolved the argument”, and incorporated these disarticulated elements into the expanding signifier of TSLRIC by representing TSLRIC as a robust methodology (Hansard, November 27, 2001; Howarth *et al*, 2000, p. 11), thereby representing the exercise of judgment in TSLRIC as robust. The range of signifiers associated with TSLRIC expanded further with the association of TSLRIC with ‘transparent’.

CLAIM 3: TSLRIC AS TRANSPARENT

Many interested parties criticised the ‘light-handed’ regulatory regime for its lack of transparency, criticising Telecom’s ownership of the network, the associated perverse incentives, and the influence of the KSO in distorting interconnection prices:

- a) Web InterNet, eVentures and Arthur Andersen criticised the manner of Telecom’s privatisation in 1989, particularly the inclusion of the PSTN in the sale. In particular, they pointed to the natural monopoly advantage of Telecom holding the network, and Telecom’s perverse incentives of maintaining the network, while having to enter commercial negotiations with competitors over access to ‘its’ network. Consequently, the interconnection process (in terms of information asymmetry and distorted prices) was not transparent.
- b) IHUG and CLEAR were both concerned with the distortion of negotiated interconnection prices and delays over interconnection agreements. IHUG noted that the Government’s insistence on adding the KSO to Telecom’s Constitution was a divisive factor in relation to negotiating access pricing, as Telecom sought to ‘recoup’ a contribution for the cost of satisfying the KSO. CLEAR pointed to the protracted negotiations over an interconnection agreement with Telecom in relation to the 1990 Ministry of Justice contract for telecommunications services and the subsequent *Telecom v Clear* litigation.

Consequently, interested parties argued for ‘transparent’ regulation. However, in invoking the imagery of ‘transparency’ and ‘TSLRIC as transparent’, interested parties condensed a complex range of significations into the signifier ‘transparency’.¹²⁶

- a) Telecom argued that a regulated interconnection process is transparent, as it is more open and subject to scrutiny than the light-handed regime, commenting that:

that the processes by which interconnection prices are negotiated [must be] fair and equitable and the methodology by which interconnection prices are set [must be] transparent and open to scrutiny.

...

Interconnection is perhaps the most significant area of interest within the current telecommunications regulatory regime in New Zealand. In Telecom New Zealand’s view, interconnection is clearly the key issue to get right. To this end, an efficient and transparent process for interconnection between networks, and with individual network providers, is vital (Telecom, 2000, p. 26).

Thus, for Telecom, the prescription of applicable pricing rules for interconnection agreements and a dispute resolution process meant the proposed regulation is transparent. It is difficult to fully appreciate the motivation behind this submission from Telecom. Given that most criticism from interested parties was levelled against Telecom, this was a subtle but clever submission, in that it constitutes an attempt to shift blame for the lack of transparency from itself to the system. In Chapter two, Gilbertson argued that Telecom’s directors had a fiduciary duty to profit maximise and ‘take advantage’ of the regulatory environment (2001, p. 3). In this ‘transparent’ challenge, Telecom argued that it is the Government’s responsibility to provide an appropriate regulatory environment.

- b) For IHUG, the prescription of TSLRIC pricing increases transparency, as there is less scope for regulatory gaming and anti-developmental abuse by Telecom (IHUG, 2000, p. 8).¹²⁷
- c) TelstraSaturn, Vodafone, and CLEAR implicated the signifier ‘transparency’ in that it reflects objectivity and truth, arguing that the problem with the previous regulatory environment was that the process distorted the ability for interconnection to reflect ‘true, objective’ costs (TelstraSaturn, 2000, p. 10; Vodafone, 2000, p. 46; CLEAR, 2000, p. 7). Given the challenges for CLEAR, Vodafone, and TelstraSaturn in achieving interconnection agreements with Telecom during the 1990s, this criticism is both a critique of Telecom and ‘light-handed’ regulation. In particular, Telecom allegedly used the ‘light-handed’ system’s requirement for entrants to negotiate with Telecom to its advantage, as there was no prescribed interconnection method and limited legal support.

¹²⁶ As explained in Chapter five, condensation is ‘fusing’ together of different elements to temporarily halt the development of competing significations. Thus, the particular content of submissions by Telecom, IHUG, Vodafone, Clear, TelstraSaturn, and Web InterNet are all fused and condensed into the ‘transparent’ signifier.

¹²⁷ See the IHUG discussion in the “TSLRIC as Robust” above.

This recognises the dual issues of Telecom's ability to distort interconnection prices and the system that 'encouraged' such distortion.

- d) Web InterNet conflated transparency with accountability with respect to the unequal bargaining positions. They claimed that the open, prescribed process provided greater accountability, arguing that with respect to interconnection, "[a]s a monopoly, Telecom have an obligation to be accountable for their actions" (Web InterNet, 2000, p. 2) Again, this is a criticism from a developing industry entrant against Telecom, for its pseudo-regulatory role (MIT, 2000d, p. 25).

In DT terms, the ability for different signifieds to be attached to 'transparency' is the "logic of equivalence", "by creating equivalential identities" (Howarth *et al*, 2000, p. 11). In Chapter five, hegemonic success is the ability to attach an increasing number of signifieds to empty the signifier of particular content. Therefore, in extending 'transparency' to refer to regulatory processes, costing methodologies, and regulatory intervention, 'transparency' is increasingly emptied of particular content. Consequently, the openness of transparency as a concept conceals the considerable confusion and contestation within the signifier. First, Telecom, CLEAR, TelstraSaturn, and Vodafone identified with transparency reflecting a regulatory process, while IHUG and Web InterNet suggested that TSLRIC-based interconnection removed Telecom's ability to distort the industry. Thus, the singular signifier 'transparency' conflates TSLRIC as a costing methodology with TSLRIC as a regulatory process (a dispute resolution process for interconnection access), and TSLRIC as a regulatory intervention (to correct information asymmetry). Consequently, the rhetorical use of 'transparency' incorporated each party's argument. However, submitters criticised each of these claims. TelstraSaturn, e.g., was adamant that TSLRIC was not a transparent costing methodology. As Black suggests, TelstraSaturn argued that increased communication between industry players and the regulator increased the scope for regulatory games playing (2002b). TelstraSaturn was:

... concerned with the requirement that carriers are responsible for carrying out TSLRIC modelling of their own ... allowing carriers to choose their expert consultants also creates additional risks of regulatory gaming and the

determination process becoming a lawyers' and consultants' picnic (TelstraSaturn, 2001, p. 18).

Perhaps this reflects Telstra's ability to play regulatory games in Australia within a TSLRIC framework (Lloyd, 2003, pp. 5-6). The National Party (the main Parliamentary opposition) criticised the 'transparency' of TSLRIC: Warren Kyd, MP, claimed that TSLRIC would lead to greater regulatory games playing:

We do not think this legislation will reduce the cost of calls at all. We think they will be very costly. Instead of reducing costs, the incumbents will game with each other to do a deal with the regulator, instead of reducing costs (Hansard, December 18, 2001).

National wanted to score political points by unsettling the 'much-heralded' re-regulation and did not support the Government's proposed reforms. Similarly, the Business Roundtable was heavily critical of claims that TSLRIC would solve interconnection problems by providing a 'transparent' regulatory process:

The Draft Report proposes to replace an imperfect system of price discovery subject to market disciplines by a system in which a regulatory bureaucrat will have wide discretion to set prices according to bureaucratic objectives, perhaps using bill and keep, benchmarking largely unverifiable assertions about TSLRIC along the way (NZ Business Roundtable, 2000, p. 4).

From an anti-regulatory stance, the Business Roundtable submitted that TSLRIC merely shifts the difficulty with the market-regulation system to another imperfect system based on judgment and discretion. Thus, in summary, TSLRIC was constructed and contested as signifying a transparent costing methodology, a transparent regulatory approach, and a transparent regulatory intervention.

Many parties noted that in prescribing TSLRIC, the Government failed to prescribe an approach to TSLRIC modelling. Regulatory and economic theory suggests that prescribing methodology does not necessarily result in transparent interconnection pricing, because although they accept TSLRIC is the best approach, there is almost no agreement about how to measure it (Benitz *et al*, 2002, p. 23). Further, the costing information required to generate TSLRIC models is not transparent, given the argument developed in Chapter three that cost is a contestable 'fact', as certain 'costs' are

excluded or costs are conditionally true as there are ‘different costs for different purposes’. Despite the Government’s claim that TSLRIC provided a ‘robust, transparent’ methodology, international experience indicates little consensus on how ‘cost’ should be calculated under such a model. There are at least three accepted approaches to TSLRIC modelling: 1) a ‘top-down approach’ based on full cost modelling using the operator’s actual costs; 2) a ‘bottom-up’ model-based approach, where operator’s costs are inputted into the model; and 3) a ‘read across’ approach, which is a benchmarking approach, based on international comparisons. Telecom, CLEAR, and TelstraSaturn submitted a preferred approach to modelling TSLRIC:

- a) Telecom expressed a preference for a ‘read across, benchmarking’ approach. In Telecom’s opinion, the high costs and assumption-specificity of top-down and bottom-up approaches to modelling TSLRIC are unnecessary and inappropriate (Telecom, 2001, p. 17). For Telecom, the ‘top down’ and ‘bottom up’ approaches would require Telecom to provide most of the regulatory information. In implementation, Telecom never supported a ‘top-down’ or ‘bottom-up’ modelling approach. There are potentially three reasons: a) Telecom may have been concerned about cost of compliance issues, as they would have to collect and present most costing information; b) Telecom did not want industry players or the Telecommunications Commission to interrogate its costing information, as it then becomes contestable; or c) Telecom wanted to maintain its information asymmetry position.¹²⁸
- b) CLEAR preferred a top-down, full cost TSLRIC modelling exercise, based on adjustments to the operator’s accounts, as it is the interests of all industry players to get cost-plus prices as accurate as possible (CLEAR, 2001, p. 37). CLEAR was interested in basing prices on ‘actual’ cost information. They maintained their support for TSLRIC through the implementation phase.
- c) TelstraSaturn noted the difficulties and costs associated with top down methodologies and submitted that a pragmatic “read across” or “bottom-up” approach would be most suitable. It argued for interconnect charges within a range based, at the bottom end, on the incremental cost of providing service and at the top end, on the standalone cost of providing the service (TelstraSaturn, 2001, p. 9). TelstraSaturn drew upon Telstra’s Australian experience of a top-down TSLRIC approach in this submission that, as Chapter two discussed, led to accusations of accounting and managerial cross-subsidies against Telstra.

¹²⁸ See the discussion in Part II of this chapter concerning the articulation of a TSLRIC model.

Arthur Andersen noted that the international consensus was “it is only possible to arrive at sufficiently efficient interconnect prices by implementing a costly top-down approach, probably supplemented by both model-based methodologies and international benchmarking” (2000, p. 29).

However, when instituting the TA, the Government did not provide any detail on modelling TSLRIC despite these submissions. Thus, the TA instituted TSLRIC as a label without specifying the approach for implementing it. The Government maintained that TSLRIC provided a robust, transparent methodology (Hansard, November 27, 2001) largely due to its control of the public discourse: in particular, the Government did not publicly acknowledge the process of ‘creating’ a TSLRIC model or judgments in determining the appropriate TSLRIC modelling methodology. The MIT Final Report reinforces the confusion, by commenting that in relation to TSLRIC pricing:

... should a determination on price be required, the determination process is not a ‘one-way bet’ for access seekers, but rather an objective, open and transparent process based on elaborated specific pricing principles (MIT, 2000d, p. 53).

As identified above, the process is unlikely to be transparent due to the need for costing information, and ‘naming’ TSLRIC does not constitute an elaborate pricing methodology. Consequently, the Government could use this confusion to claim that TSLRIC was ‘transparent’ without providing any positive definition of ‘transparency’. In short, a transparent regulatory process was better than the opaque ‘light-handed’ regulatory system and consequently the Government conflated various interested parties into the ‘transparency’ signifier.

Thus, each rhetorical claim about TSLRIC played an important role in developing broad-based support for TSLRIC. Within each rhetorical claim, there are various contested and disputed interpretations and meanings, but each interested party is invited to interpret TSLRIC as ‘best practice’, ‘robust’ and ‘transparent’. In the analysis though, it is evident that the most important rhetorical claim for the

Government is that TSLRIC is not the “Baumol-Willig” pricing rule. This is an important strategy, as it demonstrates a distinct shift from ‘light-handed’ regulation. It constructed the “Baumol-Willig” pricing rule as a metaphor for all that was wrong with the ‘light-handed’ framework, as well as constructing a metaphor that TSLRIC is not the “Baumol-Willig” pricing rule, and consequently, the past regulatory failures would not be repeated.

CLAIM 4: TSLRIC AS NOT THE “BAUMOL-WILLIG” PRICING RULE

The Labour Government was motivated to score political points against the previous National Party Government, as they had not intervened in telecommunications. Government rhetoric claimed they were solving previous unresolved problems and they were implementing landmark regulation. In particular, the Government noted that the *Telecom v Clear* litigation and the Baumol-Willig pricing rule allowed recoument of monopoly rents. This was a clever metaphor for it rhetorically constructs the National Party and those not supporting the regulatory change as favouring monopoly abuse. For interested parties including CLEAR, Arthur Andersen, Don Wallace and Associates, and eVentures the *Telecom v Clear* litigation and the “Baumol-Willig” rule were core dislocatory moments (Arthur Andersen, 2000, p. 15; Don Wallace and Associates, 2001, p. 7; and eVentures, 2000, p. 1).¹²⁹ In particular, the MIT and MED pointed to the anti-development and stagnating effects of the decision, while much of the Commerce select committee and the Government’s rhetoric and regulation focussed on ensuring that *Telecom v Clear* and the “Baumol-Willig” rule could never happen again. Finally, CLEAR noted the stifling effect of the decision on the industry. CLEAR commented:

[the Baumol-Willig rule] is increasingly regarded as an aberration arising from New Zealand’s unique approach to deregulation.

¹²⁹ The Privy Council decision constitutes a dislocatory moment, as it demonstrated the limits of the light-handed regulatory system. It was disruptive, as it came to represent the failure of the light-handed regime, and is seen as the genesis of the shift to the TA and the need for an interconnection pricing access regime.

...
The [Efficient Components Pricing Rule] has been considered, criticised and rejected by regulatory authorities, experts and industry in virtually every country which has, or is moving towards, a competitive telecommunications environment, including the rules' founders. Regulators in Australia, the US, the UK, Hong Kong and Canada have all rejected the Baumol-Willig rule (CLEAR, 2000, p. 189).

Given CLEAR's interconnection battle with Telecom through the 1990s, it is unsurprising that it is highly critical of the "Baumol-Willig" rule. However, although Telecom won the right to use the "Baumol-Willig" rule, no interconnection agreement actually used it. However, the MIT noted the 'cooling effect' of the 'omni-present' rule. Equally, the "Baumol-Willig" rule was rhetorically presented as the problem with 'light-handed' regulation: the *Telecom v Clear* case, as a dislocation, demonstrated Telecom's ability to frustrate the regulatory framework, as explained in Chapter two. However, in rhetorically constructing "Baumol-Willig" as the failure of light-handed regulation the Government did not blame Telecom, the limited CC resources, the weakness of the general competition law framework, or the dubious 'threat' of further Government regulation.¹³⁰ Instead, the judicial process, particularly the Privy Council, and the *Telecom v Clear* decision, which instituted "Baumol-Willig", are constructed as representing what was wrong with "light-handed" regulation. In legislating for TSLRIC, the Government was trying to deliver a decisive anti-"Baumol-Willig" message.

Consequently, "Baumol-Willig" developed into a touchstone political issue, and was 'condensed' at the Parliamentary level as 'the' key political object during the select committee process and readings of the Telecommunications Bill before Parliament.

MED comments:

[The TSLRIC] principle makes it absolutely clear that the BW ["Baumol-Willig"] rule cannot be used for interconnection pricing (and means it is unnecessary to exclude specifically BW pricing).

...

¹³⁰ Chapter two presented these factors as the failure of the 'light-handed regulatory regime', according to regulatory commentators.

Officials do not consider that it is necessary or desirable to ban BW ... (MED, 2001, p. 23).

However, although the MED claimed that it was evident that “Baumol-Willig” could not be used in NZ, this was not sufficient for the Commerce select committee. In ignoring the MED advice, they specifically named the “Baumol-Willig” rule and clarified that it does not apply in NZ (contrary to MIT and MED advice) by inserting clause 2 into schedule 1 of the Telecommunications Bill:

2 Application of Baumol-Willig rule

- (1) To avoid doubt, the Baumol-Willig rule does not apply in respect of any applicable initial pricing rule or any applicable final pricing principle that provides for a forward-looking cost-based pricing method as a possible pricing principle such as interconnection where TSLRIC is applied.
- (2) For the purposes subclause (1), the Baumol-Willig rule means the pricing rule known as the Baumol-Willig rule as referred to in *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* (1994) 6 TCLR 138, PC.

Equally, the select committee inserted clause 60, which abolished appeals to the Privy Council pursuant to the Telecommunications Bill. Thus, the issue of Baumol-Willig shaped Parliamentary debate, shifting the focus to the failure of political parties, particularly the National-led Government of the 1990s, to take the initiative in the telecommunications industry. In the third reading of the Bill, David Cunliffe, MP, chairperson of the Commerce select committee commented: “... the use of the controversial Baumol-Willig rule that had plagued the litigation in this industry for most of the last decade, since the *Telecom-Clear* decision, has once and for all been laid to rest as a rule for interconnection pricing”. The Minister for Communications, Paul Swain, reinforced this:

[The Industry] is bolstered by stricter interconnection rules, including the Total Service Long-run Incremental Cost pricing rule (TSLRIC), and the outlawing of Baumol-Willig pricing---not before time

...

For nine years the previous Government sat on its hands and did absolutely nothing. It watched as people tried to get access to telecommunications services, and it watched them go off to the Privy Council, where a bunch of old lords in London decided what we should be doing in our telecommunications industry in New Zealand. That Government did not have the fortitude to deal with the problem, and watched and fiddled while Rome burned. Once again, the Labour-Alliance Government has come into this Parliament, after having done the work in Opposition, and has introduced a regime that the vast majority of the industry is now saying it wants (Hansard, December 18, 2001).

Rhetorically, Labour was in a difficult position, but it largely could control the public debate as the newly elected Government with popular support. Labour wanted to blame the previous National Government for not changing the regulatory regime, and acquiescing to Telecom's dominance and the "Baumol-Willig" rule. But, the new Government had to be careful as the Fourth Labour Government had deregulated and privatised telecommunications and established the light-handed regulatory regime that arguably resulted in the "Baumol-Willig" decision. Hence, the Government sought to focus the debate on the failure of the previous National Government to act decisively when the real problem occurred (namely, the *Telecom v Clear* decision), as opposed to institutional, regulatory failure.

In summary, there was marked disagreement about the institution of TSLRIC, but the Government tried to accommodate and dissolve aspects of counter-hegemonic interventions. Thus, the Government and its agents applied the 'logics of difference' to integrate significant challenges into the 'signifier': e.g. the challenges to transparency and robust, were closed down by the Government 'accommodating' these claims into the broad hegemony surrounding TSLRIC – by acknowledging but downplaying the scope of judgment in TSLRIC the criticism was diffused. Consequently, Government rhetoric claimed broad-based support for TSLRIC, enacting it as the legislative methodology for interconnection access. The next section considers how and why the Government rhetorically claimed that net costing for the TSO was the appropriate regulatory framework, particularly since the MIT and interested parties argued against a regulatory cost recoupment mechanism.

2 *Articulating the Social Logic of Net Costing of the TSO*

The Telecommunications (Disclosure) Regulations 1999 required Telecom to present an annual net costing of the KSO, characterising the social landscape as a

sedimented practice for Telecom.¹³¹ However, there was little political capital in the administrative disclosure requirement, and indeed, little media attention to net costing. Following the MIT's final report, it appeared the net costing process would remain a regulatory disclosure requirement. However, the Government's response to the MIT signalled a significant change in regulatory direction regarding the TSO because the net costing process became a contested process as Telecom's competitors would be required as 'liable persons' to pay a proportional amount in compensation to Telecom for satisfying the TSO requirements. Then, net costing of the TSO really mattered. However, this approach took many interested parties by surprise.

The KSO is effectively a social welfare instrument (Laffont & Tirole, 2000, p. 63).¹³² There are three levels to the social welfare effects of the TSO:

- 1) provision of telecommunications services for the blind, deaf, and other disabled persons;
- 2) no discrimination in price or service provision between urban (cheaper) and rural communities (expensive); and
- 3) a general social consensus that communications technology is a form of public good (Laffont & Tirole, 2000, pp. 64-65).

However, the KSO proved a difficult instrument to regulate due to a combination of factors. First, the KSO guaranteed basic social welfare through a doctrine incorporated into the Constitution of a private company (MIT, 2000d, p. 38). Social welfare tends to be a function of Governmental agencies not private entities like Telecom. Second, many interested parties, including IHUG, Web InterNet, eVentures, Federated Farmers, TUANZ, and the Te Horo Telecom Users' Group argued that the KSO enabled Telecom

¹³¹ Social logics involve a contextualised reading of the rules, practices, concepts, categories, and sedimented social practices that structure the social landscape. Thus, in understanding the social landscape of regulation with respect to the KSO, the Telecommunications (Disclosure) Regulations 1999 constitute an important component of the social landscape, as they provide the rules for the presentation of the annual net cost of the KSO.

¹³² Note that the KSO is a form of universal service obligation. In telecommunications, a universal service obligation (USO) is an obligation placed on service providers to ensure that a minimum level of standard telephone services, payphones and prescribed services are reasonably accessible to all people (Grossman & Cole, 2003, p. 150).

to distort interconnection prices (as Telecom recouped KSO costs from its competitors), and reduce network investment (as the KSO constituted both a price ceiling and price floor) (Economides, 1998, p. 45).¹³³ Business NZ and Federated Farmers argued that the failure of light-handed regulation to provide a dedicated access regime encouraged Telecom to charge a mark-up to cover KSO provision costs in its interconnection agreements (2000, p. 4; 2000, p. 9). Thus, the existing KSO was variously regarded as complex, unfair, inappropriate, and a mess (Newberry, 2006, p. 4).

Consequently, while interconnection was arguably the more politically visible re-regulation issue, for certain societal groups including rural communities and disability communities, the KSO was most important. In their analysis of the KSO, the MIT argued that the status quo should be maintained. In part, they did not accept the ‘distortion of interconnection price’ argument. Further, the MIT held that in the commercial sale of Telecom, Telecom’s shareholders had agreed to the burden of the KSO at privatisation. Thus, the MIT recommended the maintenance of KSO information disclosure (including cost) pursuant to the Telecommunications (Disclosure) Regulations 1999,¹³⁴ unless Telecom could prove that the KSO ‘unreasonably impair[ed]’ its bottom line (in this event the Government could re-regulate the KSO) (MIT, 2000d, p. 5). However, the Government ignored the MIT recommendation. Government rhetoric suggests that it was convinced that the KSO clouded interconnection agreements and pricing (despite the MIT suggesting that there was no distortion or that the TSLRIC method would remove scope for this). Consequently, the Government instituted a regulatory mechanism to separately account

¹³³ Also, there was concern that urban customers subsidised rural customers, as urban customers paid comparatively more than rural customers in relation to the cost of providing urban telecommunications services (Hausman & Sidak, 2007, p. 65).

¹³⁴ See Appendix 1.

for the net cost of the TSO, with the right for Telecom to independently recoup a proportion of its cost from liable industry parties.

The annual net costing of the TSO existed prior to the Government instituting it and politicising it (cost recoupment) as a core regulatory mechanism. As Appendix 1 illustrates, Telecom and the Government are familiar with an annual TSO net costing exercise (this characterises the rules and practices within their shared social space). However, the net costing process was a closed disclosure between Telecom and the Government effectively empty of particular content for most industry and interested parties. Other industry players had no involvement in the annual net costing exercise, as it was a regulatory compliance issue between Telecom and the Government as part of Telecom's privatisation in 1990. However, this exercise 'suddenly' emerged as a key regulatory issue due to the Government legislating for its cost-recoupment.¹³⁵ The empirical analysis of the cost discourse is more complex than TSLRIC, as there are three parties:

- i) MIT: The Government insisted on a comprehensive telecommunications inquiry, including a consideration of the KSO. After a full investigation, the MIT recommended the maintenance of the status quo, which included Telecom providing an annual net costing of the cost of providing the KSO. Equally, the MIT concluded that a cost-recoupment process was unnecessary as Telecom accepted the burden of the KSO at privatisation, and there was an 'exit clause' if the KSO became unduly burdensome.
- ii) Government: Without warning, the Government rejected the MIT's proposal with respect to the KSO regime, and proposes a cost-recoupment framework based upon an annual net costing of the TSO. The Government argued that the KSO unduly distorted interconnection pricing, and separately accounting for the KSO provision brings more unfettered interconnection prices and a more transparent KSO regime. They also served to construct the KSO issue as a failure by invoking the image that the it distorted interconnection pricing thereby illustrating: a) the limits of the light-handed regime by not preventing this distortion; b) the problem of Telecom using their market position as network provider and KSO provider to recoup KSO costs by increasing interconnection prices; and c)

¹³⁵ 'Suddenly' refers to the level of surprise, as the MIT had explicitly rejected the need for cost recoupment, holding that Telecom had accepted the risks of the KSO at privatisation (see Chapter three for more detail).

how the “Baumol-Willig” rule, particularly its monopoly profit component,¹³⁶ stunted competition in telecommunications.

iii) Interested Parties: These ‘scrambled’ to articulate a discourse around the concept of ‘net costing’. This was restricted to submissions to the Commerce select committee. Consequently, comparatively more of the focus of select committee submissions was on net costing and cost recoupment regimes than TSLRIC interconnection pricing.

Hence, the empirical analysis identified technical, methodological, and political arguments in relation to net costing of the TSO, which focused on two complex nodal points that thematise the social logics, including that net costing of the TSO is robust and transparent; and objective and independent. Figure 7.4 depicts the contestation and condensation surrounding net costing of the TSO.

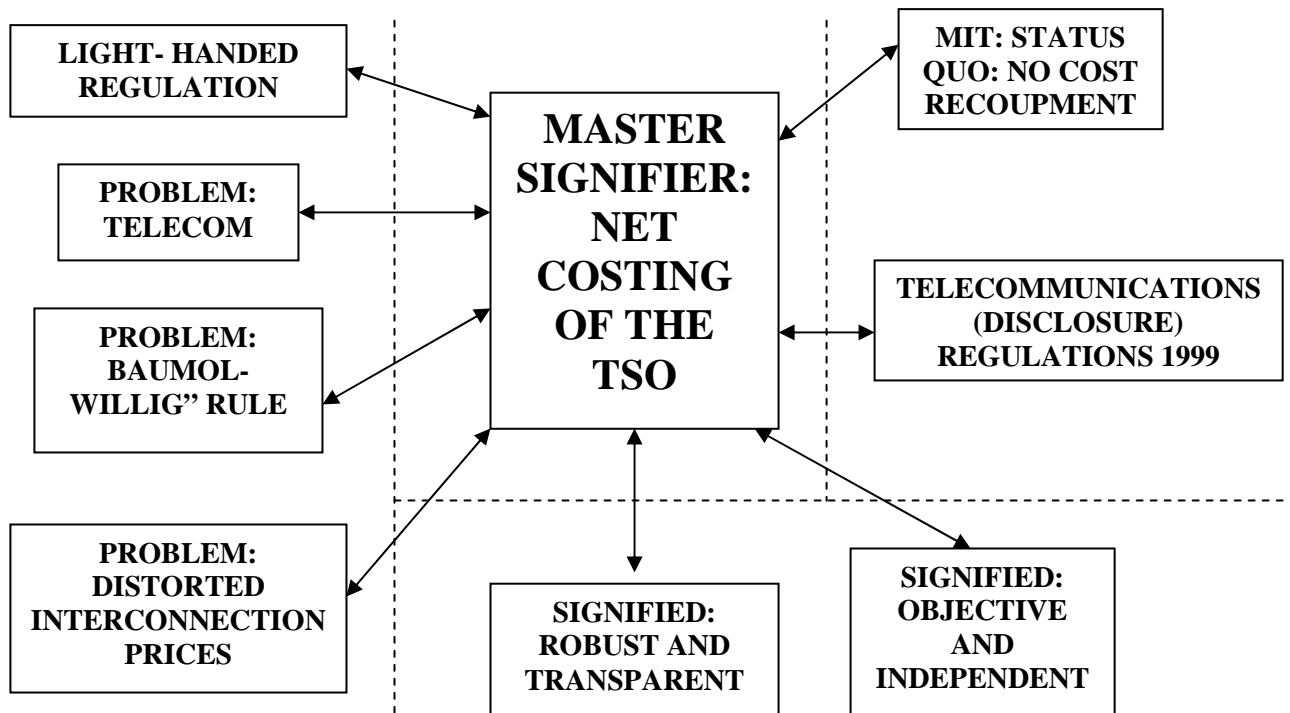


Fig 7.4: Competing articulations of net costing of the TSO

Consequently, the ensuing analysis examines the politics of the consultation process, whereby interested parties formulated the discourse around these competing representations of the social landscape of net costing of the TSO, as well as analysing the contextualised and conflictual nature of this thematic presentation.

¹³⁶ See Chapter two for the definition and effect of the “Baumol-Willig Rule”.

CLAIM 1: NET COSTING AS ROBUST AND TRANSPARENT

Interested parties argued that Telecom used the KSO to distort interconnection prices when charging a mark-up to represent the KSO provision cost (see IHUG, Web InterNet, eVentures, Federated Farmers, TUANZ, and the Te Horo Telecom Users' Group). Consequently, interested parties and the Government argued that the net costing, cost recoupment process was 'robust' and 'transparent'. However, like the TSLRIC discussion, both robust and transparent are floating signifiers, capable of representing a complex condensation of meanings. In invoking the signifier 'robust' and 'transparent', interested parties attached various concepts to 'robust' and 'transparent' including openness and subject to scrutiny. Thus, interested parties, regulators, and the Government read in various 'definitional' signifieds, condensed into the dual signifiers 'robust' and 'transparent':

- a) TelstraSaturn argued that the net costing model improved transparency, as the regulated net costing model is subject to scrutiny:

Given that the net cost calculation is prepared by the TSP itself (Telecom, in the case of the Kiwi Share), a mechanism to ensure transparency and accountability should be found (TelstraSaturn, 2001, p. 53).

In this argument, TelstraSaturn appreciated a contestable regulatory mechanism, as opposed to relying solely on Telecom's calculations of the net cost of the TSO, as that calculation was not transparent.

- b) Business NZ, CLEAR, and TUANZ claimed that the net costing process was transparent as it was open (CLEAR, 2001, p. 8; TUANZ, 2001, p. 7). Business NZ commented:

Business New Zealand supports the provisions for independent costing of Telecommunications Service Obligations (TSOs), such as Kiwi Share. We also agree with a process being put in place where telecommunications industry players can contribute to TSO net costs in a more transparent and neutral way (Business NZ, 2001, p. 5).

Again, Telecom's competitors and other industry advocates appreciated the removal of the net costing from Telecom, which could abuse the process.

However, although CLEAR and TelstraSaturn appreciated the open nature of the TSO calculation, they were cautious about the net costing procedure and were concerned

with the lack of specificity of the net costing methodology or model. CLEAR argued that it “does not consider that the [Telecommunications] Bill provides a framework for ‘a robust and transparent costing methodology’” (CLEAR, 2001, p. 8). Equally, TelstraSaturn cautioned that “[n]o industry funding model for calculating and allocating the cost of the Kiwi Share, or any other TSO, will be perfect”, but the “Bill does not address the calculation of the cost”. TelstraSaturn noted the difficulty of the calculation process, acknowledging that “... in its application and practice [the net costing] will likely be fraught by different views on the cost of the Kiwi Share” (TelstraSaturn, 2001, p. 53).

Irrespective of these criticisms, the Government claimed that the net costing process was transparent by removing Telecom’s ability to charge an unregulated mark-up on interconnection prices. In the third reading, Paul Swain, Minister for Communications, commented that:

This part of the bill implements a more robust methodology for establishing the cost of telecommunications service obligations, such as the Kiwi share, including independent assessment by the commissioner. It also provides a transparent and competitively neutral mechanism by which other telecommunications firms will be required to contribute to Kiwi share obligation costs (Swain, 2001c).

The Government sought to remove the TSO influence on interconnection pricing, by arguing that Telecom was pricing it with a margin for the KSO, arguing that, “[i]ndustry currently contribute to the costs through a premium on interconnection” (Swain, 2001b). Thus, the Government, in implicating the rhetoric of the “Baumol-Willig” rule, removed the ability of Telecom to distort interconnection prices, establishing a rhetorical link between the regulatory interventions of TSLRIC interconnection pricing and net costing of the TSO.

Consequently, the next section of analysis examines the politics of the consultation process, especially Government rhetoric creating “equivalence” through signifiers of objectivity and independence.

CLAIM 2: NET COSTING AS OBJECTIVE AND INDEPENDENT

Interested parties argued for an ‘objective’ and ‘independent’ net costing process. In particular, Federated Farmers and IHUG were concerned about the lack of independence in Telecom’s annual net costing of the KSO pursuant to the Telecommunications (Disclosure) Regulations 1999. Interested parties argued that removing the net costing calculation from Telecom was positive, and would result in more accurate, objective costing: e.g. Federated Farmers favoured an objective costing process given divergent industry views on the net cost:

The Federation strongly supports the principle that any net losses to TSPs in performing TSOs will be independently costed ... while the Federation is aware of the arguments in respect to the costs associated with the KSO with wildly differing views between Telecom and other industry participants as to the true costs of supply, it is important that any obligations on TSPs for the performance of TSOs are accurately costed. Currently, there is simply conjecture as to the costs involved (Federated Farmers, 2001, p. 16).

Federated Farmers argued that the primary purposes of the TSO were fairness, equity, and social welfare, and thus they urged the Government to explicitly tie net costing of the TSO to “government social policy objectives”, so the Commissioner would not be confused about the costing process’s function. In particular, Federated Farmers and Rural Women NZ who represented rural communities advocated strongly for objective costing, in the belief that Telecom distorted the cost disparity between providing telecommunication services to urban and rural customers.

Most industry players accepted that an ‘independent’, objective calculation would be better than the perceived subjective, captured calculation delivered by Telecom pursuant to the disclosure Regulations. However, this ignored that Telecom would provide almost all the costing information to the Telecommunications

Commissioner's calculation of the annual net cost of TSO provision. TUANZ, though, submitted that "[o]ur support assumes that independent evidence will prove conclusively that there is indeed a net cost!" (2001, p. 7). TelstraSaturn, TUANZ, CLEAR, and Charles River Associates [CRA] were concerned about the regulator's ability to provide objective and independent costs. CRA invoked the imagery of 'neutrality' to reinforce the objective element, arguing that a neutral 'cost calculation' of the TSO would ideally be competitively neutral, thereby fostering optimal investment by Telecom and new entrants. Neutrality and objectivity are synonyms. CLEAR argued that overstating network risk would 'upset' the neutrality of the calculation (CLEAR, 2001, p. 8), while CRA claimed competitive neutrality would be difficult, and would lead to competitive asymmetry with "perverse and regressive incentives" for both Telecom and new entrants. CRA stated that:

The [net costing approach] was developed in the early 1990s when competition was in its infancy. It was designed for a time when the telecommunications industry in each country was dominated by a single incumbent. It provides preferential treatment for entrants while placing a heavier burden on the incumbent to fund service obligations (CRA, 2001, p. 8).

CRA argued that the net costing of the TSO was counter-intuitive to the objective of the regulation, particularly 'fairness' and 'equity' (CRA regularly consulted for Telecom).

Thus, there was disagreement about the institution of net costing, particularly the competitive effects of the net cost model, and its lack of specificity and methodology. However, the Government was motivated to separate the distortion effect of the TSO from interconnection prices, which received industry support.

B The Effect of Articulating the Social Logics of TSLRIC and Net Costing

Rhetorically, the signifiers of TSLRIC pricing and net costing played a significant role in constituting the new regulatory regime. The following discussion outlines how the articulation of each signifier captured the relevant debate and assumed a position as a hegemonic signifier:

- a) In DT terms, TSLRIC and net cost are catachresical in that they name the absent fullness of the existing order. These signifiers are antagonistic to the light-handed regulatory system: i.e. the failure of the light-handed regime is tied to the failure of an interconnection regime (the lack of a TSLRIC interconnection process) and distortion of interconnection prices through the KSO (the lack of a separately regulated method to calculate the cost of satisfying the KSO). In particular, Government rhetoric used the “Baumol-Willig” pricing rule as a signifier to name the failures of the light-handed system. This signifier, as an umbrella term, highlighted failures of the judicial process, and Telecom’s ability to distort interconnection prices through inflating prices and charging a mark-up to represent the KSO provision cost. This historicity marked the shift to TSLRIC.
- b) In combination, TSLRIC and net costing represent the full regulatory failure of the light-handed system, representing the logic of equivalence. Both TSLRIC (a failure of interconnection) and net costing (a failure of the KSO) are metaphors for individual failures, but the combination constitutes a metonym for the failure of the light-handed system, itself tied to an interconnection regime failure and distorted interconnection prices through the KSO;
- c) As floating signifiers, TSLRIC and net costing are tendentially empty of particular content: i.e. interested parties, regulators, and the Government read in various signifieds into the master signifier. Thus, several signifieds are condensed into a single signifier. See Figures 7.1, 7.2, 7.3, and 7.4 as illustration.
- d) TSLRIC and net costing are further emptied of meaning by presentation of the method (TSLRIC and net costing) as methodologies. Thus, there is a collapse of method to methodology. This is evident when interested parties challenged the signifier, claiming that no methodology was prescribed. Here the logic of difference was employed to incorporate these concerns within the master signifier.
- e) The collapse of method and methodology extended the chain of equivalence. By not providing detailed prescriptions of the methodology to be employed, those that submitted about methodology were seen to be supporting the method. Thus, all potential methodological disputes were incorporated into the signifier.
- f) The Government was motivated by a political agenda to score points against the National Party, the previous Government. The Government rhetorically claimed that they were solving problems from the previous Government, and were implementing landmark regulation. In particular, they noted that the *Telecom v Clear* litigation and the Baumol-Willig pricing rule, allowed the price to recoup monopoly rents. This was a clever metaphor, for it rhetorically constructs the National Party and those that not supporting the regulatory change as favouring monopoly abuse.

Thus, at the political logic level, the combination of dislocatory moments, rhetorical framing, and hegemonic signification resulted in the institution and sedimentation, at the social logic level, of TSLRIC for interconnection pricing and net costing for the TSO. However, the signifiers are tendentially empty of meaning, as the legislation had little content or detail on enacting both methods. Thus, consideration turns to the political agitation over implementing and interpreting the master signifiers.

PART II: INTERPRETING AND IMPLEMENTING THE ACT

Part II concentrates on the TA's implementation and interpretation following enactment. The TA established the office of the Telecommunications Commissioner, and appointed Douglas Webb as the first Commissioner. When requested by an industry party, the Commissioner must determine the appropriate TSLRIC price for interconnection access. Equally, the Commissioner must calculate the annual net cost of satisfying the TSO. However, the regulatory story is more complicated as TSLRIC and net costing are names of costing methodologies only and the TA provides little guidance, leaving much of the detail to the Telecommunications Commissioner. In short, the TA requires the Commissioner to 'fill in the gaps' in consultation with interested industry players and stakeholders in constructing and employing the TSLRIC and net costing models. Thus, given that TSLRIC for interconnection and net costing for the TSO are enacted, sedimented social institutions, the analysis shifts to how the Commissioner implemented and interpreted the regulatory tools, despite industry contestation that sought to facilitate, complicate, or frustrate the regulatory process. This analysis examines two rhetorical positions: 1) that TSLRIC is transparent; and 2) that net costing is robust and transparent. This involves rhetorical analysis, as TSLRIC and net costing constitute the social space. However, the latter is not fully articulated, as the Government legislated TSLRIC and net costing in name only. Consequently, there was room for political contestation over the approach, modelling, meaning, and

calculation of these cost concepts. This invokes two levels of rhetorical analysis. First, interested parties articulate and agitate specific meanings of TSLRIC and net costing for regulation purposes. This invokes a second form of rhetorical analysis, as interested parties rhetorically constructed and articulated attributes to both TSLRIC and net costing during the institution phase of the regulation. The analysis examines how these common condensed signifiers (presented in Part I of the empirical analysis) are displaced with a focus on the employment of rhetorical figures in the ‘ontical’ analysis of the role of cost.

CLAIM 1: TSLRIC IS TRANSPARENT

Many interested parties agitated for the introduction of ‘transparent’ TSLRIC into the TA. Analysis revealed that the range of signifieds read into ‘transparency’ included ‘TSLRIC’ introducing a transparent regulatory process, a transparent costing methodology, or a transparent regulatory intervention. In particular, the contestation focussed on whether TSLRIC provided a transparent costing methodology or a transparent regulatory process. The Government did not clarify or correct any of these interpretations of transparency. However, soon after the passage of the Act, the Telecommunications Commissioner was asked to provide definitive insight into what TSLRIC signalled for the TA requires interconnection access seekers to ‘reasonably’ negotiate interconnection terms with Telecom; and, “in the event” that terms are not agreed the access seeker may apply to the Commissioner to determine the interconnection terms. Interconnection with Telecom’s fixed PSTN under the TA 2001 is a designated access service, and the primary pricing principle is TSLRIC.

Consequently, the Telecommunications Commissioner had to articulate the appropriate methodology for calculating TSLRIC, so the articulated model could be

applied in particular cases. In essence though, there was no starting point, as the TA gave the CC considerable flexibility. Part 2 of Schedule 1 of the TA, defines TSLRIC:

TSLRIC, in relation to a telecommunications service, -

- (a) means the forward-looking costs over the long run of the total quantity of the facilities and functions that are directly attributable to, or reasonably identifiable as incremental to, the service, taking into account the service provider's provision of other telecommunications services; and
- (b) includes a reasonable allocation of forward-looking common costs.

The definition is broad, and the CC required considerable ‘establishment’ research and consultation to construct the TSLRIC model. Figure 7.5 illustrates the initial phase in the contestation, content, model, and articulation of TSLRIC:

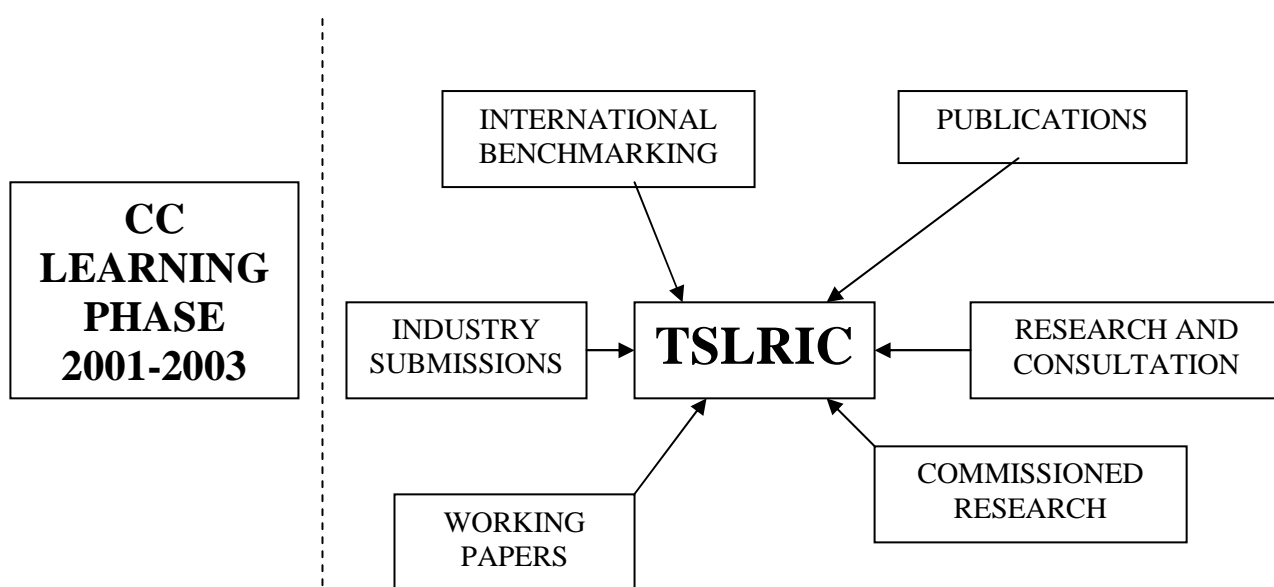


Fig 7.5: Articulating the ‘gap’: the CC’s initial learning phase 2001-2003

The CC issued a series of conceptual working papers around TSLRIC, followed by workshops, a conference (in June 2003), and submissions by interested parties. This negotiation period was interspersed with the publication of a series of papers on the access determination process including *A Guide to the Role of the Commerce Commission in Making Access Determinations Under the Telecommunications Act 2001* (CC, May 2002), *Application of a TSLRIC Pricing Methodology* (CC, July 2002), and *International Benchmarking Study: A Comparative Review of Interconnection Pricing* (CC, September 2002). The CC required Telecom to develop its own TSLRIC model, as allowed pursuant to the TA, and the CC developed its TSLRIC model in conjunction

with an overseas consultancy. Following a draft determination and further submissions, the Telecommunications Commissioner determined the appropriate TSLRIC pricing methodology with a decision presented 20 February 2004. This was an intensive, extended period of time. However, the following analysis concentrates on the complex period of contestation over competing articulations of the appropriate TSLRIC model by the CC and the industry, leading to the final determination in 2004.

In April 2002, Frontier Economics presented the CC with a commissioned report entitled *Interconnection Pricing Methodology* on appropriate pricing models for interconnection and various designated access services. This represented the first characterisation of appropriate interconnection pricing principles. Frontier Economics recommended:

- 1) Pure bill and keep for data calls and either pure bill and keep or hybrid bill and keep for local voice calls;
- 2) Forward-looking costs (TSLRIC) for toll-bypass and toll-free interconnected calls; and
- 3) Forward-looking costs (TSLRIC) for mobile-to-fixed calls (Frontier Economics, April 2002).

This caused consternation amongst interested industry parties, resulting in industry players being heavily involved in submissions and agitation in constructing the TSLRIC model. Interestingly, this debate mirrored submissions by Telecom, CLEAR, and TelstraSaturn during the select committee phase prior to the passage of the TA (Telecom supported a ‘read across’ benchmarking approach, 2001, p. 17; CLEAR submitted for a top-down, full cost TSLRIC model, 2001, p. 37; and TelstraSaturn suggested that a pragmatic “read across” or “bottom-up” approach would be most suitable, 2001, p. 9).¹³⁷ Consequently, the Frontier Economic report was subject to

¹³⁷ A top-down TSLRIC model analyses how incurred cost (based on re-valued management accounting and operational information) varies with respect to changes in volume, while a bottom-up constructs the cost of equipment required to produce a given level of output (PWC, 2003, p. 21).

increasing dispute, first, on whether TSLRIC was the appropriate mechanism, and second, what approach should be taken to modelling TSLRIC:

- 1) Telecom was increasingly concerned about the prospects of a bottom-up TSLRIC model, particularly the ability of the Commission to require Telecom to provide all costing information, while reserving the right to manipulate any aspects of the model. Telecom was concerned about the lack of ‘transparency’ and it commissioned two consultants to comment on TSLRIC modelling. CRA agreed with the Frontier Economics report, while PWC argued that the sole use of a ‘bottom-up’ TSLRIC modelling approach would inappropriately distort interconnection prices in the NZ context.
 - i) CRA argued that a pure bill and keep system for voice and data calls would provide the greatest long-term benefits to end-users, agreeing with Frontier Economics that, in respect of TSLRIC:

Although in theory, setting interconnection charges on the basis of forward-looking costs [TSLRIC] may be preferable, in practice there may be circumstances in which such an approach would not give best effect to the Act (CRA, June 2002, p. 6).

For CRA, TSLRIC pricing sends out inaccurate pricing signals to the market, estimating TSLRIC is “costly, time-intensive, and contentious and that the accuracy of the calculations is always at question”, and any TSLRIC charge will not accurately reflect variations in intra-day charges (the cost of interconnection varies with the time of interconnection) (CRA, June 2002, p. 6). In this submission, CRA criticised the alleged ‘transparency’ within TSLRIC.

- ii) PWC had three recommendations: 1) bottom-up models should not be used in isolation, as they have an inherent tendency to underestimate ‘real’ world costs; 2) the use of top-down models provides comfort that cost estimates are realistic; and 3) international best practice points to the development of top-down and bottom-up models together with a reconciliation of the two approaches, as used in the UK, the Netherlands, Ireland, France, Switzerland, Sweden, and Denmark. PWC noted that TSLRIC was an economic cost, reliant on accounting information. For PWC, TSLRIC is the cost “incurred today of replacing existing equipment’s functionality and capacity” (PWC, July 2003, p. 13). PWC’s main argument was that a bottom-up TSLRIC model would artificially distort interconnection pricing.
- 2) TelstraClear disputed the Frontier Economics report, and focused on demonstrating that TSLRIC was best for pricing interconnection access, arguing that TSLRIC should be used for determining interconnection prices for all fixed PSTN services. In particular, TelstraClear argued that:
 - i) TSLRIC promotes efficient competition, as access seekers face the same costs as an efficient access provider. TSLRIC promotes efficient facilities-based competition, as access seekers face the ‘correct’ incentives to invest in their own infrastructure or use Telecom’s

network. TSLRIC pricing maximises allocative efficiency by encouraging resources to be allocated to their most highly valued use. TSLRIC focuses on achieving ‘best practice’, and thus promotes productive efficiency by supporting least cost production (TelstraClear, 2002, pp. 2-5).

- ii) TSLRIC optimises dynamic efficiency by providing correct incentives for “efficient investment in innovative, higher quality, lower cost technologies”. Essentially, TelstraClear argued that TSLRIC should provide an appropriate interconnection price that is neither “too high or too low” (TelstraClear, 2002, p. 7); and
- iii) That irrespective of the obvious complexity of TSLRIC calculations, “much experience and knowledge associated with the application of TSLRIC has been gained” from implementing TSLRIC in many other jurisdictions. In that capacity, the “difficulties associated with estimating TSLRIC do not appear to be a defensible reason” for adopting an alternative pricing methodology for interconnection (TelstraClear, 2002, p. 13).

TelstraClear (as a network service provider), and the second largest competitor, wanted TSLRIC interconnection pricing, as they sought a cost of capital component to be included in the access price.

- 3) Dr Tim Kuypers (for Network Economics Consulting Group [NECG]) supported a top-down TSLRIC model reconciled with a bottom-up approach, as it was considered international best practice. However, based on international experience, NECG provided a series of warnings, challenging the transparency signifier. The primary concern was that though Telecom’s accounting information is of assistance in implementing a TSLRIC model, it should not be used if it cannot be validated (NECG, 2003, p. 3). Consequently, NECG recommended that if Telecom seeks the development of a TSLRIC model utilising Telecom’s cost information then it must make all relevant information available for industry scrutiny.

All industry consultation culminated in the release of the Telecommunications Commissioner’s Final Determination on 20 February 2004 that determined the appropriate TSLRIC pricing methodology. The Telecommunications Commissioner discussed a broad range of conclusions regarding TSLRIC pricing methodology.

- 1) The CC argued that a bottom-up modelling approach was more likely to result in more accurate results for calculating TSLRIC than a top-down approach, as it is:
 - a) consistent with the TA;
 - b) generally preferred by overseas regulators and there is growing overseas experience of using it in bottom-up TSLRIC models;

- c) more amenable to estimating forward-looking costs;
 - d) adopted by the CC for net costing of the TSO; and
 - e) likely to provide greater transparency, minimise control of inputs by Telecom, and avoid needs for an accounting separation framework to capture costs as in a top-down model (CC, 2004, p. 20).
- 2) Particular accounting decisions included:
- a) Traffic-sensitive costs should be apportioned to the core network and customer-sensitive costs apportioned to the access network. The definition of the core network is important to any TSLRIC modelling process, as it drives the scope of costs included in the TSLRIC model of designated interconnection access services (CC, 2004, pp. 29-32).
 - b) The CC adopted a “titled annuity approach” combining both a return on capital and a return on capital (depreciation), as most appropriate for TSLRIC modelling (CC, 2004, p. 36).
 - c) The “total service” aspect of TSLRIC should in principle include all services that utilise assets used by the interconnection services. For the Commission, ‘the total service’ approach would result in an appropriate range of services to allocate the assets’ costs. The “long run” is the time horizon where all facilities used to provide services are variable and are included in the cost calculations:

Long run refers to a period of time in which all resources are variable. That is a period of time sufficient for the firm to be able to alter all the inputs it uses to provide the service. In this way, long-run costs include the costs of all inputs used to provide the service. Importantly, TSLRIC includes costs that, once incurred, are sunk. For instance, the costs of assets that have no alternative use once deployed (CC, 2004, p. 57).
 - d) The cost of shared and common network assets should be allocated across services that use the assets to ensure that all services receive an equitable allocation of the costs and the risk of under or over recovery is minimised. Further, common costs will be allocated across services according to each service’s network usage (CC, 2004, p. 64).
 - e) To determine the total cost of providing a service under TSLRIC, it is necessary to determine the efficient level of operating costs. Operating costs include both directly and indirectly attributable costs. “For example, some maintenance costs may be indirectly related to the number of interconnection call minutes” (CC, 2004, p. 65). Only ‘reasonably identifiable’ indirect costs are incremental to the service. Further, Telecom’s actual cost data are useful. However, there are concerns surrounding confidentiality, transparency, that may require adjustment to remove inefficiencies, and the use of actual data involves judgment in the treatment of shared and common costs and in assessing justifiable costs of the designated service. As a consequence, in modelling interconnection services, the Commission determined that operational and maintenance costs and indirect costs should be calculated using percentage mark-ups applied to the capital asset base.

- f) Finally, given the TSO regime, there is a risk of double counting costs under the TSO and TSLRIC models. The CC agreed to exclude from the TSLRIC model those costs recovered through the TSO. This involves adjusting or removing network traffic associated with network elements determined to be commercially non-viable and for which costs are recovered via the TSO (CC, 2004, p. 76).

This is a prime example of the articulation of the TSLRIC model. In DT terms, there is a double ontic gap that derives from Derrida's undecidability between the rule (at the universal level) and its application in a particular case in relation to TSLRIC and net costing. As the TA was silent on technological and methodological detail, to implement the TSLRIC interconnection model the Telecommunications Commissioner had to undertake two levels of articulation: first, from the concept to a model, and second, from the model to each case. The first articulation (identified in the Final Determination above) involved taking the floating signifiers of TSLRIC and articulating the model to be employed, by detailing the methodological elements for constructing the TSLRIC. The second is the process of taking the generally articulated TSLRIC and net costing model and applying them to a particular case. Here, there are two rhetorical, unavoidable moments through the invocation of metaphor: the first being the articulation of the model; the second the result of applying the model in particular cases. There is no *a priori* reasoning to support the contention that the general TSLRIC signifier incorporates the articulated TSLRIC and net costing models, or that the TSLRIC model incorporates the particular result in its application. This increases the scope for political contestation over interpreting and implementing regulation. Consequently, the Government did not legislate a specific TSLRIC, but merely the signifier. During two years of extensive consultations, those interested in the TSLRIC interconnection pricing model made submissions on how TSLRIC should be calculated from legal, accounting, economic, and regulatory perspectives. This dispute illustrates the regulator's difficulties in dealing with the complications and complexities of

telecommunications regulation. Thus, two years after beginning the consultation, the CC determined the shape of the model, including various important accounting decisions. The next is the articulation of the model in a particular case, which requires articulating the required accounting information, to determine an interconnection price.

However, the decision moment constitutes, for Derrida, a moment of subjectivity due to each particular case involving the adjudicator (the Commissioner) undertaking an act of articulation, which metaphorically adapts the general rule to fit the particular situation (by making the general similar to the particular). The signifier TSLRIC is open and absent of particular content. Thus, the first ontical movement fills this gap by instituting a model for calculating TSLRIC. This illustrates the distance between undecidability and the necessity of making a decision. In articulating a model for TSLRIC, the model is a metaphor for the method of TSLRIC, but is always ambiguous, being akin to attempts to close a partially constituted system. Thus, although the model for TSLRIC may attempt to close the system, as this is necessary, it is punctuated with impossibility. Hence, there is continual agitation from interested parties to change the articulated model. The regulators and interested parties are engaged in an undecidable rhetorical game.

Furthermore, as Chapter three illustrates there is considerable scope for political dispute in articulating the general model to the particular case (the second ontic gap): e.g. consider the scope for dispute over apportioning traffic-sensitive costs, appropriate rates of capital and capital depreciation, designation of network and interconnection assets, identifying and allocating shared and common network assets' costs according to 'usage', identifying operating costs to include directly and indirectly attributable costs, tracing 'reasonably identifiable' indirect costs, and identifying and excluding double counted costs regarding the TSO. This is an intensely methodological, technical, and

political process, fraught with difficulty. The CC is susceptible to the full gamut of disputes flowing from the theory of cost, whether from economic, interpretive, or critical theory. However, the articulation from the general model to the particular case would fill the second ontic gap. To conclude, TSLRIC as a method and methodology is effectively empty until the model is constructed and a price is determined. This reinforces Major and Hopper's conclusions regarding the implementation of ABC in Marconi in Portugal (2005; 2007).

CLAIM 2: NET COSTING IS ROBUST AND TRANSPARENT

There was an intensely contested 'conversation' between the regulator and the regulated in constructing the net costing model for the TSO under Part III of the TA (Bowie, 2001). The Telecommunications Commissioner, pursuant to ss 92 and 93 must determine:

- a) the net cost to the TSP for satisfying the TSO;
- b) liable persons (i.e., other telecommunications competitors who benefit from the TSP's compliance with the TSO);
- c) the amounts payable by liable persons;
- d) whether the TSP has satisfied and complied with the TSO, by satisfying minimum service standards and coverage.

However, early evidence following the enactment of the TA indicates that interpreting and implementing net costing is difficult. In particular, there was intense industry agitation over constructing the net costing model. As all parties that use Telecom's PSTN network could be liable for a proportion of the costs of satisfying the TSO, more industry participants are concerned about net costing than TSLRIC. Equally, there is an annual net costing exercise, whereas the TSLRIC has been developed and used only once since the passage of the TA. Consequently, any interpretation of the net costing process (from creating, applying and evaluating the net costing model) by the

Commissioner is intensely scrutinised by affected parties. In short, there are three main disagreements surrounding TSO practice:

- a) The TSO net costing model. Industry participants expressed significant disagreement over the method of calculating the 'net cost' of satisfying the TSO (Weighted Average Cost of Capital and various CAPM models). For industry participants, small changes in the net costing model can lead to significantly different costs of satisfying the TSO. For small, new entrant competitors, this can have a significant effect on foreseeable profitability and success;
- b) The results of the application of the net costing model. Industry participants (predominantly, Telecom and TelstraClear) disagreed over the 'net cost' of satisfying the TSO (actual costing of TSO compliance). Telecom and TelstraClear carry the burden of the TSO cost but face different incentives. Given that Telecom was unable to openly seek cost recoupment for satisfying the TSO (it was alleged to have used the KSO to distort interconnection prices), it is in Telecom's interests to argue for the greatest net cost possible, resulting in a larger cost recoupment (Telecom has always carried the cost of the TSO, so the costing exercise is effectively an accounting ledger exercise – in many ways, it is not a real cost to Telecom but the liable persons' payments constitute cash revenue). On the other hand, given that TelstraClear is one of the largest competitors they are liable for a large proportion of the net cost. In the 2002-2003 annual net costing exercise, TelstraClear were liable for \$3,396,393, from a TSO net cost of \$56.8 million. TelstraClear are motivated to argue for the lowest annual net cost possible. Interestingly, Vodafone, as the second largest user of Telecom's PSTN, who were liable for \$13,526,650 of the 2002-2003 annual net cost, remained quiet during the annual net costing exercise.
- c) Industry participants disagreed over the definition of liable persons and their amounts payable. Several actively agitated to be excluded from the 'liable persons' category. Vodafone and TelstraClear argued for a broad definition of "liable person" to reflect direct and indirect interconnection. CallPlus Limited sought consistency between the TSO determinations for 2002-2003 and 2001-2002. Counties Power Limited submitted that direct interconnection with Telecom's PSTN was the simplest method. Whoosh Wireless, Citylink, BCL, and Vector Communications argued that they should not be liable persons, as they are not primarily reliant on Telecom's PSTN. WorldxChange Communications argued for a revised definition of liable person to include companies that actually use the PSTN and who were excluded from TSO calculations, including dial-up Internet service providers (ISP), pure ISPs, and existing liable persons who also operate dial-up ISP services (CC, Final Determination, 24 March 2005).

The CC manages various roles in the annual net costing process. It is complex mix of determining the net costing methodology, 'determining' cost "facts", judging the

‘veracity’ of information provided to the CC by interested parties, applying the net costing model, determining liability of interconnecting parties, determining the amounts payable by liable parties, and adjudicating compliance with the TSO requirements. This process requires a considerable ‘judgment’ across ‘questions of fact’, ‘law’, and ‘cost at methodological, technical, and political levels’. In political terms, there is tremendous scope for contestation and dispute.

1 Articulating the Appropriate Net Cost Model

The TA and Telecommunications (Disclosure) Regulations 1999 were largely silent on the appropriate model for calculating net cost, providing little guidance as to how the net cost of TSO provision should be determined.¹³⁸ The sole Government advice was that the Telecommunications Commissioner had largely unfettered discretion to construct the most appropriate net costing model: David Cunliffe, MP, Commerce select committee Chairperson commented that: “We have clarified the telecommunications service obligation through ... giv[ing] the Commissioner the option of using either weighted or unweighted costing methodologies according to the purpose of the bill” (Hansard, 19 December 2001). Consequently, there is a gap between the ‘universal’ signifier, “net costing”, and the appropriate model to determine net cost in a particular case. The notion of the gap is important in the creation of ‘rules’. If the net costing ‘rule’ were applicable to the concrete case, say the net costing of the 2002-2003 period, this would be a concrete rule for that period, which is different to every other period. For Derrida, this is not a rule, as a general rule cannot include the particular: general rules need articulation to the particular case. Consequently, rules (as concepts applicable in various concrete cases) must be applied to particular cases, and this is an act of articulation. Thus, the CC had to ‘fill’ the gap, by engaging in significant debate, consultation, contestation, before the Telecommunications Commissioner determined in

¹³⁸ See Appendix 1 for the Telecommunications (Disclosure) Regulations 1999.

2002 that a “simplified Capital Asset Pricing Model [CAPM] model” should be employed for calculating the net cost of TSO provision (Lally, 1992; Cliffe & Marsden, 1992). Table 7.1 below articulates the constituent elements of the “simplified CAPM model”

Table 7.1: The Net Costing Model for the TSO: “Simplified CAPM Model”

After-tax cost of capital (the weighted average costs of debt and equity)	$WACC = k_e(1-L) + k_d(1-T_c)L$	Where: k_e = cost of equity capital k_d = cost of debt T_c = corporate tax rate L = leverage ratio
Cost of Debt (k_d)	$k_d = R_f + p$	Where: R_f = risk free rate p = premium to reflect marketability and exposure to the possibility of default
Cost of Equity (k_e)	$k_e = R_f(1-T_I) + \phi\beta_e$	Where: T_I = average tax rate on interest income ϕ = post-tax market risk premium β_e = the beta of equity capital
Beta Equity of Capital (β_e)	$\beta_e = \beta \frac{[1 + L]}{1 - L}$	Where: B_a = the asset beta (the equity beta in the absence of debt)

However, its determination caused considerable dispute between industry participants and the CC: e.g. in 2004, there was still significant dispute between Telecom, TelstraClear, and the CC as to its constitution. PWC, for Telecom, submitted that the CC’s reliance upon the CAPM was flawed claiming that Fama and French’s research indicated that CAPM estimates are understated (Fama & French, 1993; PWC, 2004, p. 24). PWC submitted that this resulted in the Commission underestimating the reasonable rate of return for providing TSO services by two per cent and cumulatively underestimated the TSO weighted average cost of capital [WACC] by more than two per cent.

MJA, for TelstraClear, submitted that the CC’s CAPM model was flawed due to its domestic focus. MJA stated that a purely domestic CAPM produces higher WACC estimates than an international CAPM. MJA submitted that the Commission must

consider both an international and a domestic CAPM, on an internally consistent basis, and then choose a WACC estimate between the two estimates (MJA, 2004, pp. 5-6).

In response, the Telecommunications Commission argued:

- a) The Fama-French model constitutes the best-known empirical challenge to the CAPM. Fama and French developed an empirical, rather than theoretical, model that relates asset returns to a market factor (as done by CAPM) as well as to size and book-to-market factors. The CC, however, noted that there was no consensus on the implications of the Fama-French results with respect to the validity of CAPM (Jagannathan & McGrattan, 1995; Malkiel & Xu, 1997; 2000):

Since a consensus on the status of CAPM does not currently exist, the Commission believes that it would be premature to reject the CAPM as the benchmark in setting rates of return. In addition, the Commission notes that the betas referred to in Fama and French are *equity* rather than *asset* betas and thereby reflect leverage differentials across firms (CC, 2005, p. 35). [Emphasis in original].

- b) The CC recognised that a domestic CAPM assumes segmented capital markets, while an international CAPM assumes capital markets are fully integrated. The CC considered NZ's economy to sit "somewhere in between", while noting a "substantial home bias" for NZ investors. For the CC, the international CAPM would be difficult to apply, and consequently:

The more complex international CAPM is not suitable for estimating the cost of capital in a regulatory setting (CC, 2005, p. 35).

- c) Finally, the Commission re-stated the basis for calculating the net cost of TSO provision:

The Commission is not aware of any development since its 2001-2002 TSO determination that suggests that an alternative approach is warranted. The Commission has therefore decided to continue with the simplified Brennan-Lally CAPM to estimate the TSO cost of capital (CC, 2005, p. 35).

Consequently, there is still marked technical, methodological, and political disagreement between the CC and regulated entities over the methodology to determine the net cost of TSO provision. This displaces the logic of the net costing exercise providing robust and transparent annual net costings of satisfying the TSO. Consider the 2001-2002 and 2002-2003 annual net costing of the TSO, depicted in Figure 7.6.

2001-2002 net cost of the TSO

FACT: “Simplified CAPM model” provides robust and transparent annual net costs of satisfying the TSO.

FACT: Telecom: TSO cost = \$425 million

FACT: Telecom’s revised TSO cost = \$408 million

FACT: TesltraClear’s TSO cost = \$214 million

FACT: Telecommunications Commissioner Final Determination \$73.4 million

2002-2003 net cost of the TSO

FACT: “Simplified CAPM model” provides robust and transparent annual net costs of satisfying the TSO.

FACT: Telecom: TSO cost = \$215.5 million

FACT: Telecommunications Commissioner Final Determination \$56.8 million

Fig 7.6: Contestation: Annual net costing figures for 2001-2002 and 2002-2003

The striking feature of these disputes is that each party used the same net cost model and costing information. This illustrates the technical, methodological, and political challenges posed by the interface of law and accounting. There was considerable disparity between each party’s estimates of the annual net cost and each year’s net cost figures: in 2002-2003, Telecom submitted that the net cost of the TSO was \$215.5 million based on a WACC of 13.1 per cent. PWC submitted to the Commission that 13.1 per cent was a ‘reasonable estimate’ considering:

- a) Updated revenue information for 2002-2003;
- b) The WACC of 10.5 per cent for Telecom Mobile and 14 per cent for Xtra;
- c) The unreasonableness of the 6 per cent WACC in the Commission’s draft determination; and
- d) A two-percentage point margin for asymmetric risk issues associated with the CC’s bottom-up estimate of the cost of TSO provision (PWC, 2003).

The CC disagreed with Telecom and PWC, determining a \$56.8 million annual net cost for the TSO. They adopted a post-tax WACC of 7.1 per cent. However, they provided no justification as to why this was the most appropriate WACC. Net costing is not transparent. In summary, in DT terms, this net costing example is a prime illustration of the double ontic gap. At the first level, there is the articulation of the “simplified CAPM model” to fill the gap left by the signifier “net costing”. At the second level, there is the annual articulation of the cost of the TSO when employing the model. Thus, each year that the model is defended against criticism from interested parties, constitutes a ‘re-iteration’ of the model, and reaffirms the metaphor of “simplified CAPM model” for net costing. Equally, in 2002-2003, the articulation of \$56.8 million is a metaphor for the “simplified CAPM model”.

Therefore, there is still considerable contestation over interpreting and implementing the TA. The basic problem remains: TSLRIC and net costing were broad signifiers, and little legislative guidance was provided. Thus, the Telecommunications Commissioner had to engage in a rhetorical process of ‘filling in the gaps’ in consultation with interested industry players and stakeholders.

PART III: FANTASMATIC LOGICS OF COST

Part III of the empirical analysis reflects on the fantasmatic. In particular, by reflecting on fantasmatic logics, the thesis explains and critiques how subjects are ‘gripped’ by ideological presuppositions of ‘costing’ that sustain their identity and are attached to the social and political logics of cost. In the empirical analysis the process of instituting TSLRIC for interconnection and net costing for the TSO raised serious technical, methodological, and political questions. In short, exposing elements of subjectivity, judgment, the methodology vs method debate, and information asymmetry inherent within costing, exposed the ‘radical contingency’ of both TSLRIC and net

costing. However, despite these challenges, four 'ideological' themes continued to dominate the presentation of TSLRIC and net costing, and helped smooth over the radical contingency of the regulation. Therefore, this analysis identifies how cost and 'objectivity'; cost and 'transparency', cost and the 'resolution of past disputes'; and cost and the 'public interest' ideologically functioned to 'smooth over' the various challenges presented by parties to 'costing' at the social and political level.

In the transition from light-handed to sector-specific regulation, there is uncertainty and antagonism, as the Government, its agents, the Telecommunications Commissioner, telecommunications industry players, and interested parties reconstruct their identities in relation to the new regulatory regime. Each interested party had to grapple with the role of cost, TSLRIC and net costing within the regulatory system. DT recognises the role of the subject, primarily through fantasmatic logic. As explained in Chapter five, if social structures are open and only tendentially closed, then social actors are open and will seek to tendentially close their identity in relation to social structures. Chapter six argued that ideology 'closes' the radical contingency at the centre of political struggle. As Althusser explained ideology is the 'transformation' of individuals into subjects through recognition": i.e. competing representations at the social and political environment draw in individuals and helps constitute themselves as subjects (1994, p. 131). This is necessary as dislocations, such as the change of Government during the 1999 General election, the announcement of a Ministerial Inquiry into Telecommunications, and the new TA 2001 disrupts the existing social order and, as explained in Chapter six, exposes the radical contingency of social relations. As subjects, this makes us uncomfortable, but ideology helps mitigate the contingency.

In the empirical analysis of transition from light-handed to sector-specific regulation, there are four core ‘ideological’ themes:

- 1) Objectivity: cost is a powerful discursive mechanism. In particular, given that most human beings, on a daily basis, are faced with ‘real costs’, cost is often ‘misrecognised’ as being objective, as opposed to contingent. This was examined theoretically, particularly in Chapter three. Scapens’ (1985) conditional truth critique of the absolute truth notion within economic cost, Covaleski *et al*’s (2003) criticism of the subjectivity of TCE in US utilities regulation, and Major and Hopper’s (2005) study of the fragmented implementation of ABC in Portuguese telecommunications illustrate the clash of objectivity (at the ideological level) and subjects and practice. In general, as noted in Chapter three, law and economics fails to recognise the inherent arbitrariness and openness of the cost concept by assuming it is simple and objective.
- 2) Transparency: the light-handed regime as criticised for its lack of transparency. In part, Chapter two illustrated various incentives available to Telecom to take advantage of the regulatory framework and act in a less than transparent manner, particularly regarding interconnection pricing and the KSO. Thus, the Government sought to separate the influence of the KSO in the distortion of interconnection pricing. The Government, despite submissions to the contrary, maintained a separate regulator, cost-based systems like TSLRIC and net costing, and the regulatory process would provide this transparency.
- 3) Resolution: the thesis demonstrates the overarching failure of the light-handed approach. In particular, TSLRIC and net costing were attached, ideologically, to the need for re-regulating telecommunications, when the failure of the light-handed model was emphasised. In particular, the *Telecom v Clear* litigation, the “Baumol-Willig” rule, and the failure of the judicial process to effectively make technical decisions about telecommunications were blamed. Accounting was seen as providing objectivity and transparency, and thus, resolves power disputes (see, Mitchell, Sikka, and Wilmott, 1996; Hines, 1988; Hines, 1989; Hines, 1991; and Arrington & Francis, 1989). .
- 4) Public Interest: much Government rhetoric holds that the new regulation, through the ‘cost’ lens, serves the public interest. This draws on a complex ideological concept, open for interpretation as explained in Chapter two. However, despite contestation over its exact meaning, ‘public interest’ is considered to be positive (Meyerson & Banfield, 1955; Downs, 1962; Marks, Leswing & Fortinsky, 1972; Horwitz, 1989).

These four ideological elements were overdetermined in social, political and fantasmatic logics as they smoothed over the contingency of costing, law, accounting, and regulation, and helped political subjects construct and maintain their positions.

II CONCLUSION

This chapter used DT and Glynos and Howarth's logics of critical explanation to empirically examine the complexity and scope for contestation throughout the 're-regulatory' phases of telecommunications. This provides a theorised 'critical' intervention for identifying failures of the light-handed regulatory system associated with the institution of TSLRIC for interconnection pricing and net costing for the TSO, and the post enactment disputes of the TA concerning the approach, modelling, meaning, and calculation of each. The social, political, and fantasmatic logics provided a framework to interrogate phases in re-regulating telecommunications and the re-regulatory process as a whole. This had three parts: retroductive logic examined how TSLRIC interconnection pricing and net costing for the TSO became the regulatory approaches in the TA; rhetorical analysis examined how the Telecommunications Commissioner implemented and interpreted the processes of the TA, and the resulting political contestation over implementing and interpreting TSLRIC and net costing; and finally, as a form of auto-critique, fantasmatic logics explained and critiqued how political actors were 'gripped' by certain ideological presuppositions of 'costing'. Key conclusions include:

- The newly elected government sought ideological protection for delivering the election promise of telecommunications change by deflecting much media and other public attention by establishing the MIT to investigate and recommend what regulation should be introduced.
- Thematically, TSLRIC had four primary nodal points characterising the social logics:
 - o TSLRIC was international best practice: the light-handed experiment was unique internationally. Rhetorically, the claim to international best practice was important to provide protection to the Government should TSLRIC fail to stimulate increased competition.
 - o TSLRIC was robust: the complex signifier represented various issues from regulatory frameworks to interconnection methodology. The Government recognised both viewpoints to expand the chain of equivalence.

- TSLRIC was transparent: the Government carefully controlled the transparency debate. The prime concern under light-handed regulation was that Telecom allegedly inflated interconnection prices by incorporating elements of the KSO. TSLRIC was then transparent as the regulator set the interconnection price. However, the Government did not publicly acknowledge the process of ‘creating’ a TSLRIC model or the judgments exercised in determining the appropriate methodology applied to apply to it; and
- TSLRIC was not the ‘Baumol-Willig’ rule: rhetorically, this was an important strategy, demonstrating the extent of the shift from ‘light-handed’ regulation, whilst constructing the “Baumol-Willig” pricing rule metaphorically as the reason for the failure of the ‘light-handed’ framework, as well as constructing a metaphor that as TSLRIC is not the “Baumol-Willig” pricing rule regulatory failures of the past will not be repeated.

Being tendentially empty of particular content, the signifier ‘TSLRIC’ encouraged interested parties, regulators, and the Government to read in various signifieds into the master signifier.

- The empirical analysis of net costing identified two complex nodal points that thematised the social logics:
 - net costing of the TSO is robust and transparent: parties argued that Telecom used the KSO to distort interconnection prices by charging a mark-up to represent the cost of the KSO provision, holding that the net costing process was robust and transparent; and
 - net costing of the TSO is objective and independent: in particular, parties argued that removing the net costing calculation from Telecom would result in more accurate, objective costing. Most industry players accepted that an ‘independent’, objective calculation would be better than the perceived subjective, captured calculation delivered by Telecom pursuant to the disclosure Regulations
- For DT, TSLRIC and net cost are catachresical as they name the absent fullness: they represent full regulatory failure of the light-handed regulatory system, representing the logic of equivalence. Both TSLRIC (a failure of interconnection) and net costing (a failure of the KSO) are metaphors for individual failures, but the combination constitutes a metonym for the failure of the light-handed system. Equally, as floating signifiers, TSLRIC and net costing are tendentially empty of particular content, particularly through the collapse of method (TSLRIC and net costing) and methodologies, which extended the chain of equivalence. By not providing detailed prescriptions of the methodology to be employed, those that submitted about methodology were seen to be supporting the method.

- Following the enactment of TSLRIC for interconnection and net costing for the TSO, the Commissioner implemented and interpreted the regulatory tools, despite industry contestation that sought to facilitate, complicate, or frustrate the regulatory process. The thesis rhetorically examined two positions: 1) that TSLRIC is transparent; and 2) that net costing is robust and transparent.
- However, the social space is not fully articulated, as the Government legislated TSLRIC and net costing in name only, providing little guidance on their interpretation and implementation. Consequently, there remained room for political contestation over the approach, modelling, meaning, and calculation of these cost concepts: First, interested parties articulated and agitated for specific meanings of TSLRIC and net costing for regulation purposes; second, although interested parties articulated several attributes to TSLRIC and net costing during the institution phase of the regulation, these common condensed signifiers were displaced.
- In examining how subjects were ‘gripped’ by ideological presuppositions of ‘costing’ attached to the social and political logics of cost, common ideologies underpinned the power of ‘objective cost’, the perception that cost-based systems like TSLRIC and net costing would provide greater transparency to the regulatory process, would resolve the failure of light-handed regulation, and by invoking the public interest, these changes were for the better.

The final chapter considers the implications, limitations, and scope for further research that emerges from the previous empirical, theoretical, and methodological analysis.

- Chapter Eight -

Conclusions: Research Articulations, Limitations, and Future Research

I RESEARCH OVERVIEW

In examining the regulatory adoption of cost in telecommunications through the logics of critical explanation and DT, the thesis makes three prime contributions: challenging and developing the interface of law and accounting, developing links between DT and its empirical execution through the logics of critical explanation (these research method developments apply to law and accounting), and developing an integrated, multi-dimensional and multi-perspective approach to regulatory theory. This thesis challenges the interface of law and accounting by critiquing the traditional conception where accounting provides information for legal processes or is subservient to law's dominance. This overly simplifies the interface. Equally, in examining disciplines, it is important to look beyond superficial similarities to unpack the differences in how the disciplines interweave. This thesis suggests that the separate analysis of disciplines like law and accounting, particularly in a regulatory, commercial context is hard, as the agitation, negotiation, and antagonism (the political) renders it difficult to analyse the disciplines in isolation. The interface's starting point is political analysis: the three phases of the re-regulation of telecommunications (problematizing the light-handed regime, instituting a new cost-based regulation, and implementing and interpreting the new regime) constituted a complex, multi-disciplinary, multi-theoretical, and political site of struggle. The re-regulation of telecommunications by the Labour-led Government radically shifted the framework from light-handed to sector-specific regulation by instituting 'cost' as the regulatory driver. This raised two research questions:

- 1) Why did TSLRIC, a cost-plus pricing model, for interconnection, and net costing for the TSO become the basis for regulating telecommunications

in NZ? How did actors discursively construct their political identities in relation to cost?

- 2) How and why were the 'rules of regulation' encapsulated by the TA implemented and introduced, especially how cost accounting information was used in the regulatory process by accountants, lawyers, and regulators? How was 'cost' employed rhetorically in interpreting and implementing the TA 2001?

However, underlying these questions is a theoretical, methodological, empirical, and political web: the thesis invokes, problematises, and develops different literatures and theories including telecommunications, regulation, economics, cost, inter-disciplinarity, law, accounting, and research paradigms in law and accounting. More generally, two questions informed this ontological shift in examining regulation:

- 1) What is the interface between accounting and law? More specifically, what is the role of accounting in telecommunications regulation? What is the role of cost and cost theory within legal regulation?

This theoretical and empirical question problematised and developed traditional conceptions of the interface of law and economics, law and accounting, telecommunications, regulation and cost. The second question, in re-invigorating political analysis, introduced DT and the logics of critical explanation, making the political nature of the interface of law and accounting explicit with respect to the employment of cost in telecommunications regulation.

- 2) What are the insights of Laclau and Mouffe's DT, in moving from costing as technical to costing as political? In particular, what insights emerge from Glynos and Howarth's logics of critical explanation?

These questions problematised and developed traditional epistemological research frameworks in law and accounting to identify the 'space' for DT's ontological analysis.

In the following analysis, there is a degree of repetition between sections as each addresses separate but interdependent issues and disciplines. Thus, the interface between law and accounting in regulating telecommunications raised multiple

theoretical, empirical, and methodological challenges, framed by the problem that relevant research was disciplinary-bound, non-political, and epistemological:

- a) The genealogy of NZ telecommunications regulation illustrated the political. In particular, Chicago and Harvard school economics shifted the direction of competition law between the free market and consumers respectively. Two ideas were developed: the economic regulatory history was actually a political history as actors used economics to invoke crises and promise better regulatory results; and telecommunications was 'political' for many actors. The analysis of the shift from light-handed to sector-specific regulation examined how the new regime 'answered' the problems of the light-handed approach. In particular, Chapter two identified the problems of interconnection access, the KSO, and the light-handed approach. The Government proposed that TSLRIC, cost-based regulation would resolve the interconnection access problem, an annual net-costing of the TSO and separate cost-recoupment would remove the influence of the KSO from interconnection, and the sector-specific TA and Telecommunications Commissioner answered the criticisms of the light-handed approach.
- b) Existing economic regulatory theory had limited explanatory power in isolation, but the disparity and conflict between the accounts illustrated that regulatory theory is intimately linked to the social and political. Regulatory literature suggests that regulating telecommunications is complex due to the degree of network interdependence and the risk of technological obsolescence. NZ's great telecommunications experiment (light-handed regulation) failed. The analysis of Chicago and Harvard school economics, public interest regulation, and regulatory capture illustrated limited parts of the regulatory issues. Horwitz (1989) examined economic, historical, and political regulatory theory arguing that economic analysis provided insight into measuring outcomes but misconstrued origins and processes; the historical approach provided insight into the historicity of regulation but lacked analytical tools for considering outcomes; and traditional political science politicised the regulatory environment but inclined towards process-oriented analysis. This suggests that the complexity of regulation both empirically and theoretically results from its multi-disciplinary nature, and consequently, this thesis analysed regulation at the ontological level, rather than the traditional disciplinary, epistemological approach. This develops Horwitz's analysis that invokes structural analysis of the components, challenges, and public interests of 'evolutionary' economic and political demands.
- c) The traditional conception of the interface of law and accounting was too simplistic: the interface is primarily based around the provision of information for the legal process and continues to grow, law and accounting are shaped by each other, and the interface is conflictual due to law's traditional domination of accounting and the professional 'clash' over the growth of accounting. Although a useful starting point, the existing literature is disciplinary-bound and epistemological. This thesis argues that the interface is political and should be examined at the ontological level. Empirically, the complex and multi-faceted interface of

law and accounting in telecommunications was examined through cost accounting assuming a central regulatory role

- d) Both law and economics hold a simple notion of cost: i.e. cost is a simple, objective measure of 'economic sacrifice'. In problematising this assumption, from an accounting perspective, the thesis demonstrated the levels of complexity to cost at methodological, technical and political levels by examining the arbitrariness and choice inherent in the construction and presentation of cost. Positivist 'cost' identifies the costs of production to the exclusion of TCE's costs of exchange, which excludes the agency cost of organisation. Technically, the regulatory regime attempted to deal with issues of bias and information asymmetry by prescribing TSLRIC and net costing as specific costing methods, and by allowing the regulator to make the final decision. However, this relies on the regulated providing 'cost' information to the regulator. Scapens further problematised cost by arguing that the more theoretically correct the economic cost is, the more subjective the measure becomes. Scapens' critique introduced a conditional costing model, based on the maxim 'different costs for different purposes' (although this subjectivity is rooted in a critique of economics). This insight was extended to interpretive and critical theory's recognition of socially constructed costs. Thus, cost is not merely technical but political and involves subjectivity, politics, consensus, conflict, and the social and institutional creation of meanings. This range of theoretical and practical 'cost' critiques poses significant challenges for regulation and research, because cost methodologically, technically, and politically invokes multiple epistemologies and ontologies.
- e) The multiple actors invoked in telecommunications re-regulation required careful analysis of micro-, meso-, and macro-political and regulatory shifts. This involved describing the major telecommunications players, particularly Telecom as the dominant incumbent and 'new' entrant competitors ranging from TelstraClear and Vodafone as more established market players through to very small, emerging new entrants. Equally, this introduced major political players from Government, political parties, the executive, and the MIT. The empirical analysis includes non-governmental organisations, lobby groups, charities, individuals, industry pressure groups, and other social activists. These interested parties have various social, economic, and political agendas. To contextualise the re-regulation of telecommunications, the thesis discussed the Labour-led Government's State re-regulation phase following the State rollbacks characteristic of the liberal economic policies of the late-1980s and 1990s.
- f) Traditional research paradigms in accounting and law did not provide sufficient scope to examine the interface of law and accounting in telecommunications. In particular, ontological and interdisciplinary challenges were problematic for the traditional epistemological analysis of positivism, interpretivism, and critical theory. In light of these limitations, the thesis articulated a post-structurally informed DT theoretical framework due to its focus on ontological politics at local and macro levels.

- g) The phases of the empirical site required flexibility. DT re-invigorates the political by looking internally within law, accounting, and regulation and examining the external effects of the political process. This provides resources to consider the phases of telecommunications re-regulation, including the regulatory genealogy, the regulatory institution of cost accounting, and the political strategies employed in the regulatory interpretation and implementation. In particular, DT responds to the theoretical critiques developed in Chapters two, three, and four. Chapter two illustrated that no regulatory theory captured the complexity of NZ's regulatory history: a good regulatory theory is interdisciplinary and considers the economic, historical, and political (Horwitz, 1989). DT's flexibility in incorporating the economic, historical, political, and discursive insights provides a comprehensive regulatory account. Chapter three argued that cost accounting challenges the regulatory system given the role of accounting at technical, methodological, and political levels. DT's integrated theoretical components including hegemony, condensation, overdetermination, and rhetoric identify, examine, and critique the political strategies employed in interpreting and implementing the cost-based regulation without being solely beholden to economic, historical, or political analysis (Horwitz, 1989).
- h) DT responds to the problem of the disciplinary bound nature of epistemological analysis by focusing on ontology and the ontic (Hviding, 2003). As cost is the central regulatory device in the TA and cost has methodological, technical, and political implications, the ontological shifts is a way of interrogating the uses and meanings of cost in accounting, law, economics, and regulation. The thesis concentrates on meanings: why was cost chosen for regulating telecommunications? What does cost-based regulation signify? How was discourse centred on the nodal point of 'cost'? How is cost rhetorically used in regulation?
- i) The highly articulated nature of DT challenges the traditional use of empirics, research methods, and analytical methodologies. Empirical analysis in DT concentrates on the 'concrete case' as an opportunity to develop DT, as opposed to DT providing a set of theoretical tools to be applied to particular social settings. The alleged normative and methodological deficits within DT include Critchley (2004) who criticises DT for failing to clarify if it focuses on description or critique, especially, as focusing on description risks emptying DT of any critical function and Torfing (1998) who challenges DT for providing 'interesting' redescriptions but failing to reflect on causality and explanation.
- j) The thesis uses Glynos and Howarth's logics of critical explanation as the appropriate methodological framework for DT-informed empirical analysis. By concentrating on a present problem, the logics of critical explanation employ retroduction to identify a social fact and then examine what gave rise to it. Social, political and fantasmatic logics provide a framework to examine how the social fact came to be: social logics examine the rules, practices, concepts, categories, and sedimented social practices that structure social interactions and relations; political logics consider the space in which the emergence, institution, and constitution of new norms, rules, and social practices are publicly contested, and

fantasmatic logics consider how subjects are ‘gripped’ by ideologies to allow social practices to continue. The empirical analysis articulates and identifies ‘nodal points’ (privileged signifiers or reference points in a discourse) and given the focus on political and fantasmatic logics, there are opportunities for critique and the identification of dislocatory moments that lead to the institution of new social practices. Documentary analysis, focused interviews, and personal experience in the regulatory environment constituted the data set for this study.

- k) The empirics examined the meanings attached to accounting information, in construction, presentation, contestation, and decision making. Cost is an ontic tool, as there are different costs for different purposes; similarly, the act of application (determining the cost to apply to a particular situation) is an articulatory practice which is a rhetorical technique. This is the DT interface of law and accounting: articulation and antagonism.
- l) In re-regulating telecommunications, the empirical analysis investigated the formation of political identities characterised by antagonism and uncertainty at numerous levels, including the discursive enunciation of standpoints and perspectives by actors at the first instance, and then, secondly, considered the politics at the level of reception post the enactment of legislation analysing contestation over interpreting and implementing the regulation. This reflects the articulation of social, political, fantasmatic logics as developed within the logics of critical explanation. In particular, in the institution phase the government sought ideological protection in delivering the election promise of telecommunications change. However, by requiring the MIT to recommend regulatory change, the Government could draw much of the media and other public attention away from itself.
- m) In relation to TSLRIC cost-plus pricing, interested parties constructed four primary nodal points that thematised the social logics including that TSLRIC was: international best practice; robust; transparent; and not the ‘Baumol-Willig’ rule. Being tendentially empty of particular content, the signifier ‘TSLRIC’ encouraged interested parties, regulators, and the Government to read in various signifieds into the master signifier. The analysis demonstrated how the “Baumol-Willig” rule was thrust into a role of ‘empty signifier’ representing all that was wrong with the light-handed approach.
- n) In net costing, the analysis identified two nodal points that thematised the social logics, including that net costing of the TSO was robust, transparent, objective and independent. This suggested that a net costing model would make the interconnection process transparent and would provide for a fairer model of TSO cost recoupment. This is the process of condensation (through the logics of equivalence).
- o) Following the enactment of the TA, the analysis shifted to evaluate how the Commissioner implemented and interpreted the regulatory tools, despite industry contestation that sought to facilitate, complicate, or frustrate the regulatory process. Rhetorically, the thesis examined two positions: 1) that TSLRIC is transparent; and 2) that net costing is robust

and transparent. However, the social space was not fully articulated, as the Government legislated TSLRIC and net costing in name only, providing little guidance as to interpreting and implementing the concepts. Consequently, there remained room for political contestation over the approach, modelling, meaning, and calculation of these cost concepts: First, interested parties articulated and agitated specific meanings of TSLRIC and net costing for the purposes of regulation; second, although interested parties articulated several attributes to both TSLRIC and net costing during the institution phase of the regulation, this examined how these common condensed signifiers were displaced.

- p) Finally, in examining how subjects were ‘gripped’ by ideological presuppositions of ‘costing’ attached to the social and political logics of cost, four common ideologies predominated: the power of the ‘objective cost’; the perceived transparency of cost-based systems like TSLRIC and net costing would provide greater transparency to the regulatory process; TSLRIC and net costing would resolve the failure of light-handed regulation; and by invoking the public interest, these changes were for the better.

From this analysis, various observations and lessons are drawn in relation to each of the components of this thesis, including the regulation of telecommunications, the interface of law and accounting, and the impact of the articulation of DT to the interface of law and accounting, as constructed by the TA 2001.

II RESEARCH ARTICULATIONS

As identified, the thesis makes three main contributions:

- a) By instituting political analysis as the starting point for the interface of law and accounting, it ontologically focuses on the construction of and agitation over meaning between law and accounting. The interface is the site of articulatory politics.
- b) DT and the logics of critical explanation provide a methodological framework for examining how cost accounting was instituted as central to telecommunications regulation by analysing dislocatory moments and the rhetorical construction and condensation of standpoints and perspectives with respect to TSLRIC and net costing. This led, through rhetorical redescription, to the displacement of meanings in interpreting and implementing the TA through identifying the unpacking and contestation of the key costing ideas.
- c) The post-structural regulatory theory framework develops existing regulatory theory by integrating existing insights into alternative research pressures (decentred, external regulation) and the challenge of regulatory communication with broad-based analysis of regulation acknowledging the economic, accounting, law, historic, and political elements of the

multi-dimensional and multi-perspectival regulation. This provides space for competing theoretical, methodological, and empirical understandings of the contested site of regulation.

This framework provides research findings on core components of theoretical and empirical material in the thesis, including telecommunications regulation, the interface of law and accounting, regulatory theory, DT and the empirics, and research methods.

A Telecommunications Regulation

The telecommunications regulation literature focuses on epistemologically bound inquiry, concentrating on economics, history, or politics. Despite Horwitz (1989) arguing for integrated telecommunication regulatory accounts, there are few examples. Consequently, this analysis of telecommunications answers and develops Horwitz by concentrating on ontological, not epistemological, inquiry and is inter-disciplinary. In relation to the regulation of telecommunications:

- a) Telecommunications presents a complex regulatory challenge due to interdependence and technological change (Laffont & Tirole, 1999). TSLRIC and other cost accounting tools are theoretically portrayed, particularly by economics, as a regulation problem solver. However, cost as the central focus increases the scope of complexity due to the technical, methodological, and political levels of cost. Economics, law and regulation suffer from the assumed simple, objective nature of cost. Cost-based regulation of interconnection and TSO might be presented as ‘solving’ particular light-handed regulation issues, but in practice, cost-based regulation intensifies problems and creates new regulatory complexity. Unfortunately, the underlying problem, the economic incentives of the incumbent to dominate the Commerce Act 1986 by pursuing their own economic endeavours is largely unchanged under the TA. Although Telecom no longer controls the determination of interconnection price or the annual net cost of satisfying the TSO, competitors must commercially negotiate with Telecom and Telecom provides most of the information to the commission. In many ways, the TA intensifies the incumbent’s incentives from a methodological, technical, and political standpoint.
- b) Government rhetoric, in the introduction of the TA, distanced the new regime from light-handed regulation. The core failures of the light-handed approach drove the adoption of the regulatory mechanisms of the TA, primarily focused on interconnection access and the KSO. However, the light-handed regime is only partly responsible for the failure of the light-handed approach. The TA, consequently, is too focused on light-handed problems to the extent that the signifier, the “Baumol-Willig” pricing rule,

is the main target: e.g. the history of *Telecom v Clear* resulted in the Government explicitly denying the right of appeal under the TA to the Privy Council, and naming the “Baumol-Willig” rule as an unacceptable pricing rule despite detailing available pricing principles under the TA. Consequently, the TA fails to satisfactorily deal with several more pressing telecommunications issues, including network investment, anti-developmental behaviour, and fair pricing as identified in Chapter two.

- c) Although the framework and context is different, the TA 2001 is not significantly different from the old Commerce Act 1986. Despite the sector-specific regulator, the interconnection access regime, and the TSO costing process, the TA fails to curtail the underlying economic incentives of the incumbent. This confirms my Masters work in law, which held that there was little material difference, in effect or essence, between the Commerce Act 1986 (general competition law) and the TA 2001 (sector-specific regulation). The underlying economic incentives to prevent, delay, or restrict new entrants from entering the telecommunications industry remain under the TA.
- d) The MIT identified the failure of the dispute resolution process as a core problem under the light-handed approach, primarily due to the inability of the court process to handle the complexity of telecommunications litigation. The new regime shifts the forum for dispute resolution, initially, from the courts to the Telecommunications Commission. However:
 - i) there is no *a priori* right to approach the Commission for an interconnection price, as there is still a requirement for a ‘reasonable’ attempt at commercial negotiation prior to seeking a Commission pricing determination. Providing for an *a priori* right to seek a pricing determination from the Commission would curb the anti-developmental tendencies of Telecom and would reduce the scope for regulatory games-playing;
 - ii) merely shifting the dispute resolution forum does not reduce the complexity of dispute resolution within telecommunications. However, the broader powers of investigation are an important addition to the regulation given Telecom’s success at challenging the CC right to conduct investigations under the Commerce Act 1986. Information is an invaluable commodity in the regulation of telecommunications; and
 - iii) the scope for contestation at methodological, technical and political levels has increased given the Commissioner’s role. In relation to the interconnection dispute, the TA recommends TSLRIC, after receiving broad-based support from industry and interested parties who submitted to the MIT or the Commerce select committee. However, the empirical analysis illustrated that the Government failed to theoretically or methodologically define what was meant by TSLRIC, and interested players were involved in displacing and challenging what was meant by TSLRIC in interpreting and implementing the TA 2001. Equally, in relation to the KSO, the new TSO provided for the annual net costing of the obligations. This is a time consuming

process, with considerable scope for argumentation and dispute, as was illustrated in the rhetorical analysis post the enactment of the TA. The argument is that Telecom, other industry players and interested parties all have scope to challenge, question, and develop different levels of net costing information at technical, methodological and political levels. This increases the scope for dispute.

- e) The Government's objective for telecommunications was "cost efficient, timely, and innovative telecommunications services on an ongoing, fair and equitable basis to all existing and potential users". Equally, the TA represented 'landmark' telecommunications legislation. The ideology of 'resolution' played a strong rhetorical role surrounding the institution and implementation of the TA 2001. Unfortunately and unsurprisingly, in the ensuing years, the Labour-led Government was dissatisfied with the telecommunication 're-regulation' results. In particular, there were two recent regulatory shifts. First, in 2005, the Government mandated the unbundling of the local loop to allow competitors direct access (for a fee) to Telecom's network to enable them to provide their own telecommunications services, as opposed to delivering their service via Telecom or wholesaling one of Telecom's products. This is a more extreme form of regulation as it takes elements of control of the network away from Telecom (in other words, TSLRIC did not provide the interconnection panacea promised and argued for in its institution). Part of the reason for this was the contestation over the development and application of the TSLRIC model. Second, on 31 March 2008, Telecom was legislatively required to separate into three companies (network, retail, and wholesale) so that the Government could wrest greater control from Telecom, particularly with respect to transparency and information asymmetry. Of interest is that these subsequent Government regulatory moves are attempts trying to attend to the underlying economic incentives of Telecom. Equally, this further regulation suggests that the TA is not providing the desired regulatory results and given the political and public importance of public goods like telecommunications, there is a lingering impression that it is better to be seen to do something rather than necessarily work through what you are doing.
- f) The Government focus for the TA was the 'existing and potential users' of telecommunication services, which invokes a confusing mix of regulatory theories and approaches including regulatory capture, public interest theory, and Chicago and Harvard school economics. Interestingly, despite the regulatory focus on end-users, the general public has no standing in the Commission, as it is limited to industry lobby bodies. Unfortunately, the most likely interested industry party to be detrimentally affected by the TA is the consumer or the general public:
 - i) NZ cannot simply reverse the degree by which competition was stunted under the light-handed regime. Network development is expensive and new entrants take time. Consequently, in NZ there are only pockets of competitive technologies developing, primarily focused where Telecom, *per se*, does not control the network: e.g. Vodafone and Telecom have established competing mobile telephony networks;

- ii) the TA adds new 'cost of compliance' issues in telecommunications. The TA's process requires extensive submissions, draft determinations, cross-submissions, and final determinations (one peculiarity is that Commission staff present draft determinations without the input of the Commissioner who is only involved in final determinations).
 - iii) the TA 'reifies' the competitor at the expense of the consumer. The focus on cost and efficiency results makes entry for new competitors easier. While this may result in increased price competition over time, there is no regulatory incentive to minimise access costs or to aid effective and cost-beneficial network investment.
- g) Telecommunications regulation cannot be analysed in isolation. It is a complex web of technology, interdependence, accounting, law, economics, and politics. The DT framework recognises the constituent roles of each of these influences.
- h) The TA has intensified the political agitation in telecommunications: there was and is a continuing political game within and around interconnection and the TSO regime. In short, the scope of political interface has increased as the problematic is not 'resolved'. There are four elements to this:
- i) Interested parties during the MIT and select committee process and the Government provided little detail around what the Act was actually going to do. The TA institutes TSLRIC as an interconnection methodology, but was silent on the detailed methods of TSLRIC. This provided scope for tremendous argumentation before the Commission, who was placed in a particularly difficult learning phase post the enactment of the TA. However, the contested nature of the Commission process (submission, draft determination, submission, final submission) has not improved the certainty of the regulation. In many ways, it is worse as the scope for contestability increased.
 - ii) In terms of regulatory communication, it is acknowledged that Telecom presents most of the information for the Commission. This presents issues of regulatory capture, regulatory games-playing and issues of due process. The commission has demonstrated that where it is unsatisfied with the form, level, or type of information presented by Telecom, it is prepared to act upon the information presented by Telecom in light of its framework and model. This involves excluding information, using proxies, or researching equivalent cost-structures from international benchmarking. However, this raises issues of due process particularly around who has the right to exclude or include information, what constitutes a valid reason, why should information be excluded and how are these exclusion or inclusion decisions made?
 - iii) The TA requires the Commission to consider 'long-term benefits of end-users', in public interest terms. However, given the commercially sensitive nature of information there is little scope for the 'public' to enter the forum. The Commission openly accepts that the public have little standing in these matters. The problem is further complicated as

there is little ability for the general public to work out what decisions have and have not been made. However, an interconnection price arrangement is deemed to be in the public interest.

- iv) The Government has been active in telecommunications since the TA, particularly around attempts to 'wrest' control from Telecom. This involved unbundling the local loop and mandating business separation.

In short, telecommunications 're-regulation' was overdue, but the overarching focus on the failings of the light-handed regime are over-determined in the resulting TA to the point that the underlying economic incentives for Telecom to prevent, restrict, or delay new entrants are relatively untouched. Thus, TA fails to adequately address the fundamental tensions of regulating telecommunications.

Given that the TA constructs cost as the central regulatory mechanism, this invites particular analysis of the interface of law and accounting.

B Interface of Law and Accounting

The traditional characterisation of the interface of law and accounting as an information flow with accounting subordinate to law is epistemologically-bound and limited. This thesis illustrates that accounting and law are actively engaged in articulatory, antagonistic politics in a state of agitation, renegotiation, and transition. The interface of law and accounting is hegemonic: DT unpacks the traditional epistemological boundaries of the disciplines of law and accounting as they do not exist *a priori*, but rather, they emerge as discursive practices and structures. In illustration, the adoption of cost accounting in regulating accounting results in the 're-articulation' of what 'cost', 'accounting', 'law', 'telecommunications' and 'regulation' mean. The interface of law and accounting is an ontic interface, as it is about institution, construction and contestation of meaning. Therefore, this thesis illustrates that:

- a) There is a theoretical, methodological, and empirical interface between law and accounting that is overlooked in the literature. There are

significant opportunities for further research to examine the constituent aspects of this interface. Interestingly, accounting researchers have recognised and attempted to reconcile the interface, while legal researchers overlook or recognise the interface in terms of information processing. However, this thesis illustrates through the centrality of cost within telecommunications regulation that the interface of the disciplines is antagonistic, developmental, and constitutive.

- b) Law, economics, and other disciplines increasingly draw upon accounting concepts. However, disciplines tend to take simplistic representations of accounting concepts, which assumes accounting as just an information provider. The thesis argues that the arbitrariness, choice, and contestation within accounting is antagonistic to epistemological disciplines (like law and economics) as it exposes their limits, arbitrariness, and contingency.
- c) In researching the interface of law and accounting, it is necessary to look beyond superficial similarities. Despite law and accounting invoking 'contract', 'public interest', and 'judgment' these are discursive terms of art. In particular, the researcher should examine the subtleties of disciplinary difference. DT's ontic lens enables this. This is a core lesson from examining Moore (1991) whose analysis was epistemologically trapped by focusing on the similar, as opposed to the dissimilar. While broadly similar at the surface, the disciplines have many intricate, subtle, but informative differences.
- d) Accounting and law possess epistemological peculiarities, which renders epistemologically-based, interdisciplinary analysis difficult. In illustration, Chapter three demonstrated the degree of difference in the law and accounting's conceptions of cost. As disciplines are epistemologically incommensurate, to examine their interface the ontological lens provided an approach to the epistemological challenges. In short, the ontological lens focuses on the construction of meanings in their social and cultural context. This study examined the construction of the meaning of the adoption of cost in legal regulation and the articulation of cost from an accounting perspective in the enactment and interpretation of the TA 2001.

Given the interface of law and accounting is articulatory and antagonistic, there is tremendous potential for further research due to the increasing scope of the interface. In particular, there is little research on the construction and presentation of accounting information for legal proceedings, on accountants as expert witnesses, and, discursively, how lawyers and accountants communicate, given the subtle but different languages unique to law and accounting.

More specifically, the interface of law and accounting invokes lessons for regulatory theory.

C Regulatory Theory: In Illustration of the Interface of Law and Accounting

This thesis focused on cost accounting assuming a central role in the regulation of telecommunications, which required reflection on regulatory theory, particularly from economic and post-structural perspectives regarding the following:

- a) As regulatory theory cuts across disciplines (law, accounting, economics, politics, and government) with multiple sites of contestable material, it requires ontic analysis. The disparity between economic regulatory theory such as Chicago and Harvard school economics, public interest regulation, and regulatory capture illustrates that regulatory theory is intimately linked to the social and political. To the extent that economic theorisations provide partial regulatory accounts, ignore the influence of competing accounts and paradigms, evaluate the failures of alternative approaches, and claim to provide comprehensive accounts of regulatory frameworks, there are social and political implications of economic approaches.
- b) Horwitz (1989) correctly concentrated on comprehensive theorising in the form of integrated historical, economic, and political accounts of regulation. However, this included a limited conception of the political, focusing on narrow, positivist politics, and consequently, underplaying power and politics. Thus, as Black (2002a) argues, there is a need to reinvigorate political analysis within regulation.
- c) Regulatory theory is complex by its very nature sitting across and alongside disciplines. Post-structural regulatory theory provides space to consider the ontic nature of the contestation over meanings. Black's work develops regulatory theory but there are limitations that require articulation:
 - i) Black's analysis of regulation concentrates on the centred/decentred dichotomy (state/non-state dichotomy). While considering the scope of non-state regulatory pressures is an important movement in regulatory theory, such post-structural analysis should also challenge various 'forms' of state-based regulation. The 'decentred' form of analysis, as demonstrated through the regulatory communications literature (Black, 2002a) indicates benefits from creating space to consider the regulatory effects and communication irrespective of the site of regulation (be it centred or decentred). The political still exists.
 - ii) Black's post-structural analysis is influenced by the Foucauldian approach to discourse, particularly in relation to the archive. Chapter five illustrated that Foucault requires the constitutive outside but fails to account for how this gets outside the archive. This is a limit to this analysis. The DT conception of 'discourse' in combination with the social, political, and fantasmatic logics, provides a framework to

understand how the ‘constitutive outside’ (the antagonistic element) takes its position through dislocation, articulation, and hegemony. These are all ‘events’ that the integrated logics of critical explanation should identify: e.g. this thesis illustrated that regulation is antagonised from multiple sources as in invoking ‘cost’ there is antagonism from accounting about the measurement and presentation of cost, but equally, there is antagonism of cost from ‘outside’, including the simplistic, objective assumption of law and economics.

- iii) With the linguistic turn of the post-structuralist project, there is scope to develop comprehensive ontic analysis of the employment of rhetoric in the construction of regulation. Equally, this thesis illustrated that regulatory politics and contestation permeates the regulatory phases, including the disruption of existing regulation, the institution of the new framework, and its interpretation and implementation. Linking post-structural regulation to DT is a powerful combination for understanding the present regulation, evaluating where regulation emerged, why it emerged, how it emerged, and where likely challenges and failures could result.
- d) Black’s (2002b) analysis of regulatory communications focuses on the provision of information in regulatory processes. However, Black’s analysis does not ‘question’ the information, but rather illustrates the tension of providing and receiving information. This thesis extended this analysis by examining the methodological, technical, and political levels of regulatory communication. This increased incentives for regulatory players to manipulate the information presented to the dispute forum. In an accounting sense, McBarnet (1996) warns that ‘creative accounting’ undermines law and regulation. Further, regulatory communication is not just about information, but is equally about strategy, regulatory games-playing, and politics.
- e) Regulatory communication is also about political communication from the State to citizens. Rhetorically, the metaphor of regulation is that regulation ‘resolves’. This plays an important ideological function (at the fantasmatic level) in this analysis. TSLRIC and net costing as regulatory drivers would solve the problems of the light-handed regime. However, analysis at the social and political logics suggested that ‘resolution’ is a myth and rhetorically, the empirical analysis unpacks this.
- f) Black’s call for discursive analysis of regulation is insightful, particularly due to the combination of micro and macro, and linguistic base and social science concerns (Black, 2002b, p. 196). However, there is unease in her analysis. Black is concerned about the ‘openness’ within discourse analysis and how this challenges law. But, what is law? What is accounting? Do they ‘exist’ per se? If it is accepted that the interface of law and accounting (and also regulation) is the site of antagonism and articulation, then this openness ontologically exists. Each instance the regulatory framework requires accounting information challenges and shapes the regulation and law. This thesis carefully showed that accounting and law are discursive constructions with no reified, *a priori*

existence. This invites the analysis of law and accounting as contingent, transitioning, changing, and evolving concepts.

Thus, post-structural regulatory theory combines both micro- and macro-level analysis to provide space to examine internal political events with an integrated, external political overview: at the macro level in NZ, the drive to 're-regulate' the State means that regulation is more common. Further, there are ever-increasing alternative regulatory pressures from community interest groups, non-governmental organisations, global capital markets, and consumers. These 'decentred' regulatory forces possess power. At the micro level, there is a process of articulation and antagonism as disciplines (law, accounting, and regulation) constitute and agitate. Given the discursive focus, the thesis examined the adversarial processes of cost construction in accounting at methodological, technical, and political levels, the adversarial nature of the political process in the construction, institution and implementation of new telecommunications regulation, and its ontological focus provides flexibility in order to conduct interdisciplinary research.

This thesis developed post-structural regulatory theory by invoking post-Marxist DT.

D Discourse Theory and the Empirics

DT explains political 'realities' and movements, including societal complexity, the multiplicity of actors and organisations, and drawing together of seemingly disparate groups in the 'name' of a political goal. In considering regulation, the thesis argued that interrogating discursive constructions of social practices is appropriate given the range of discourses invoked: law, accounting, regulation, public policy, politics, and economics. The discursive focus invited rhetorical, genealogical, and deconstructive analysis to examine the strategies, effects, and aims of regulation,

industry players, Government, lawyers, accountants, and the use of cost accounting information in the regulatory process. Thus, in relation to DT:

- a) A distinguishing feature of concrete DT analysis is the combination of macro and micro political. This benefits empirical analysis as it discursively examines micro social events in relation to macro social movements. The introduction of cost accounting is contextualised in the re-regulation of telecommunications, which is contextualised in State re-regulation. Through discursive events, DT conjoins the micro and the macro, through an analysis of antagonism and hegemony.
- b) The three levels of antagonism are a feature of DT. Antagonism operates as symbolic logic: the empirical analysis examined the structuring of discourse around the nodal points of TSLRIC and net costing (and subsequent signifiers) through an analysis of equivalence and difference. Antagonism operates at the ideological, fantasmatic level through the constitution of the negative outside which constitutes, agitates and threatens the regulation (in this study, the “Baumol-Willig” pricing rule and ‘resolution’ are examples). Finally, antagonism operates the level of the ‘real’ by exposing the inherent impossibility of social structures and society being a closed, self-contained identity.
- c) DT is insightful on both law and accounting particularly through the shift to ontology and the ontic. Given the contestable and partial nature of both law and accounting there is tremendous scope for DT. The broad approach to ‘discourse’ furthers existing accounting literature by providing a theorised intervention into the discursive, extra-discursive, linguistic, and non-linguistic characteristics of accounting. Equally, the social, political, and fantasmatic ties sedimented social practices through the contested institution of those practices and associated ideological affects. Analysis in law and accounting tends to focus on one element in isolation, but in combination, this is a powerful, theorised intervention.
- d) The post-structural, post-Marxist spirit of DT develops existing critical theory literature in two ways. First, it enables critical and discursive analysis of areas where universal, singular signifiers may have been difficult to use: e.g. class based analysis would be difficult in this type of study. Although class would be a useful signifier, it would be limited in its analytical power (consider the limited explanatory power exhibited in Chapter two when considering each individual economic regulatory theory). Second, given multiple actors, interests, and perspectives, the ability to move between signifiers is a valuable aspect of the DT framework. The political, in a post-structural sense, is a mix of local politics possessing unique signifiers, but linked to macro-political movements.
- e) DT’s incorporation of the genealogical is beneficial for research in law and accounting. The adversarial nature of law and accounting suggests that genealogical analysis is fruitful in a democratising sense, as it allows the examination of exclusions, alternatives, and what was determined. This applies equally at the micro and macro level, but illustrates the

political nature of the decision making approaches of law and accounting. There is tremendous scope for such research in accounting and law.

- f) Perhaps the most challenging aspect of this thesis was the degree of translation and illustration required between DT and interface of law and accounting to make sense of the insights. This is partly to do with the dearth of research into the interface of law and accounting. However, more generally, the abstract, articulated language of DT (while insightful) renders it difficult to translate into day-to-day practices of accounting and law. This is somewhat concerning, and is a limitation of DT. As a theory of 'discourse' and 'communication', the fact that the language of DT alienates and loses a valuable section of the audience to which it wishes to communicate is problematic. DT research must continue to work at providing insight in a way that does not exclude or marginalise the audience that it trying to talk to. In my opinion, the logics of critical explanation (through the social, political, and fantasmatic) help this 'translation'.

The complicated nature of the empirics required a flexible, political theoretical framework: as DT looks both internally to the processes of law, accounting, and regulation, and examines the external effects of the political process, DT reinvigorates the political. Equally, the focus on ontology and the ontic allows the researcher to move through the bounded nature of epistemological, disciplinary inquiry, enabling the DT researcher to consider a broader range of research questions about the intersection of law, accounting, costing, regulation, and telecommunications. Finally, as law, accounting, and regulation are linguistic practices, concentrating on the act of persuasion through the employment of various rhetorical strategies, the focus on the linguistic turn is attractive. Law and accounting both present many examples that illustrate the limits of language, the scope for contestation, and articulation.

However, DT poses a set of challenges for research, primarily due to its articulated nature. The 'negative ontology' raises issues of commensurability for many research methods presuppose the concepts and structures that are used to understand the

social landscape. This is unsatisfactory for DT. Consequently, the thesis employed the logics of critical explanation.

E Research Methods: The Logic of Critical Explanation

As a methodological development of DT, Glynos and Howarth developed the logics of critical explanation, as well as providing a response to the normative and methodological deficits within DT. The five movements of the logics of critical explanation involve: 1) problematisation, where a concrete empirical case in DT examines a present problem; 2) retroduction, where a social fact is then identified and examined to understand what gave rise to it; 3) the three logics including social (sedimented social practices), political (institution of new social practices) and fantasmatic (how subjects are ideologically gripped); 4) articulation identifying privileged signifiers or reference points in a discourse; and 5) critique through identifying dislocatory moments that are penetrated by radical contingency. Methodologically, there are series of lessons:

- a) The logics of critical explanation, in analysing the social, political and fantasmatic provides a comprehensive analysis of political and social practice. This provides a unique way of considering sedimented social practices: what are they, what were they, what they could have been, how they got there, and what their ideological effects are. The combined nature of the analysis is unique, as analysis in law and accounting tends to focus on one element in isolation, but in combination, this provides a powerful, theorised intervention.
- b) DT and the logics of critical explanation provide space to examine what is traditionally considered non-political. In particular, by concentrating on examining present problems, there is room to consider any current social practice and question and critique its 'presence'. It does this by combining 'thick' description with critique.
- c) The thesis employed document analysis and interviews with a strong experiential element, combining the non-reactive, linguistic research data of document analysis with the qualitative depth and flexibility of linguistic, reactive research data in the form of focused, unstructured interviews. The tools of data analysis included dislocation and rhetorical redescription. The examination of how actors construct the debate around the nodal point of 'cost' required the DT notion of dislocation. In particular, the thesis examined how interested actors succeeded in

sedimenting TSLRIC as the new regulatory practice in interconnection and net costing for the TSO. Equally, the empirical questions examine rhetoric, and how actors articulate the metaphorical element of 'cost' in the agitation for costing methods, and in the implementation and application of the TA 2001.

Thus, the logics of critical explanation identified and examined meanings attached to accounting information in construction, presentation, contestation, argument, and decision making. This places cost as an ontic tool, as there are different costs for different purposes. Finally, the act of application (determining the cost to apply to a particular situation) is an articulatory practice, which is a rhetorical technique.

In qualitative, political research, there are two main research limitations.

III RESEARCH LIMITATIONS

First, there are methodological limits. There is an experiential component to this research, based on my work as a regulatory lawyer. In part, these cannot be replicated and these influenced the reading of the telecommunications environment. Where possible, the experiential elements have been affirmed in interviews or with documentary sources, but this is incomplete.

Qualitative research tends to attract criticism, primarily from positivists for the subjectivity of the research process, and in particular, problems of selection and generalisability. While these are acknowledged, the study employed appropriate qualitative methodology for the collection and analysis of data. The logics of critical explanation provide a considered methodology. Furthermore, this research is attempting to uncover subjectivities and nuances. In that light, it is counter-intuitive to apply 'objectivity' criteria to the material.

At the end of the day, the qualitative researcher is a 'research instrument'. I have analysed the interviews, documents, and experiences. Methodologically, this is 'my' researched story and my invitation is for you to examine and decide whether the conclusions are warranted based on the 'record' of this thesis.

Secondly, there is a theoretical dichotomy. The articulation of DT is complex, but the empirical analysis is rich, informed, and quite simple. There are two potential limitations that flow from this: a) it is too far removed from day-to-day practice that the significance of the research is lost; b) the multi-faceted nature of the underpinning theoretical structure enables varying interpretations that are challengeable and contentious. Essentially, this risk can be minimised by engaging with interested and affected parties, keeping a firm grasp on empirical elements of the thesis, and telling a convincing, simple story. Again, this involves an invitation to examine and decide whether the conclusions are warranted based on the 'record' of this thesis.

- APPENDICES -

- Abbreviations -

ABC: Activity Based Costing

AC: Average Cost

ACCC: Australian Competition and Consumer Commission

ASRB: Accounting Standards Review Board

ATPC: Australian Trade Practices Commission

BT: British Telecom

CAPM: Capital Asset Pricing Model

CC: The Commerce Commission

CCA: Current Cost Accounting

CER: Closer Economic Relations (an economic arrangement between NZ and Australia)

D: Demand

DT: Discourse Theory

EU: European Union

FCC: Federal Communications Commission

GAAP: Generally Accepted Accounting Practice

ISP: Internet Service Providers

KSO: Kiwi Share Obligation

LRIC: Long Run Incremental Costs

MC: Marginal Cost

MED: Ministry of Economic Development

MIT: Ministerial Inquiry into Telecommunications

MJA: Marsden Jacobs Associates

MR: Marginal Revenue

MP: Member of Parliament

NZ: New Zealand

NZIFRS: New Zealand Equivalents to the International Financial Reporting Standards

OECD: the Organisation for Economic Co-operation and Development

OFTEL: The Office of Telecommunications

P(m): Monopoly Price

PAT: Positive Accounting Theory

PSTN: Public Switched Telephony Network

PWC: PricewaterhouseCoopers

Q(m): Quantity supplied and demanded at monopoly price.

SAC: Stand-alone Costs

s: section

TA: Telecommunications Act 2001

TSLRIC: Total Service Long Run Incremental Costing

TSO: Telecommunications Service Obligation

TSPs: Telecommunications Service Providers

TUANZ: The Telecommunications Users Association of New Zealand

UK: United Kingdom

USA: United States of America

VTB: Value to Business

WACC: Weighted Average Cost of Capital

- Appendix 1 -

Telecommunications (Disclosure) Regulations 1999

The Regulations detailed significant changes to Telecom's disclosure regime including requiring Telecom to calculate and disclose the net economic cost of complying with the KSO obligations. Telecom had to disclose:

- i) Any losses incurred in complying with the KSO, including details of the amount of loss attributable to each KSO component, and the amount of loss attributable for to individual customer groups; and
- ii) The way it recovers KSO losses, including the internal or external sources for recovering losses, the amounts that Telecom recovered from each of sources, and the components of any charges that Telecom uses to recover these losses from.

The Regulations prescribed principles for the calculation of the cost of the KSO:

- i) The cost of the KSO is the unavoidable net losses incurred by an efficient operator in providing the KSO-mandated services to the customers or groups of customers required;
- ii) The net cost calculation must be based on objective, transparent, non-discriminatory and proportionate procedures and criteria;
- iii) The net cost calculation should identify the cost, less revenues and associated benefits of providing services covered by the KSO, to a customer or group of customers;
- iv) When calculating net cost, a quantification of the intangible benefits of being New Zealand's only universal service provider, an implicit requirement of the KSO, should be added on the benefit side;
- v) The net costs of emergency services, directory services, directory listings and the provision of special equipment or services must be identified separately;
- vi) No account may be taken in calculating the net cost of KSO of obligations which are outside its scope other than those specifically included.

Equally, the Regulations required Telecom to:

- i) publish an audited calculation of its KSO costs twice yearly in conjunction with the publication of its financial statements under the financial information disclosure regime;
- ii) disclose the full methodology used for calculating the above information (including any models used); and
- iii) to retain all data, including calculation models and associated documentation, for at least seven years.

- Appendix 2 -

Accounting Costing and Pricing for Designated Access Services

Part 2 of Schedule 1 of the Telecommunications Act 2001 provides for a variety of pricing principles and methodologies, summarised in the following table:

Designated Access Services	Initial Pricing Principle	Final Pricing Principle
<i>Interconnection with Telecom's fixed PSTN</i>	Benchmarking against interconnection prices in comparable countries: (a) a forward-looking cost-based pricing method; or (b) if appropriate: (i) a pure bill and keep method; or (ii) a pure bill and keep method applied to two-way traffic in balance (or to a specified margin or out-of-balance traffic) and a forward-looking cost-based pricing method applied to out-of-balance traffic (or traffic beyond a specified out-of-balance margin).	Either – (a) TSLRIC (b) if appropriate: (i) a pure bill and keep method; or (ii) a pure bill and keep method applied to two-way traffic in balance (or to a specified margin or out-of-balance traffic) and a forward-looking cost-based pricing method applied to out-of-balance traffic (or traffic beyond a specified out-of-balance margin).
<i>Interconnection with other PSTN other than Telecom's PSTN</i>	Either – (a) the price determined by the Commission (if any) for interconnection with a network of Telecom's that corresponds most closely in nature to the access provider's network; or (b) a forward-looking cost-based pricing method; or (c) if appropriate: (i) a pure bill and keep method; or (ii) a pure bill and keep method applied to two-way traffic in balance (or to a specified margin or out-of-balance traffic) and a forward-looking cost-based pricing method applied to out-of-balance traffic (or traffic beyond a specified out-of-balance margin).	Either – (a) the price determined by the Commission (if any) for interconnection with a network of Telecom's that corresponds most closely in nature to the access provider's network; or (b) TSLRIC; or (c) if appropriate: (i) a pure bill and keep method; or (ii) a pure bill and keep method applied to two-way traffic in balance (or to a specified margin or out-of-balance traffic) and a forward-looking cost-based pricing method applied to out-of-balance traffic (or traffic beyond a specified out-of-balance margin).
<i>Retail services offered by means of Telecom's fixed telecommunications network</i>	Either – (a) retail price less a discount benchmarked against discounts in comparable countries that apply retail price minus avoided costs saved pricing in markets which Telecom faces limited, or is likely to face lessened, competition for that service; or (b) retail price less a discount benchmarked against discounts in comparable countries that apply retail price minus avoided costs saved pricing in markets which Telecom does not face limited, or lessened, competition for that service.	Either – (a) average or best retail price minus a discount comprising avoided costs saved pricing, in markets in which Telecom faces limited, or is likely to face lessened, competition for that service; or (b) average or best retail minus a discount comprising actual costs saved, in markets which Telecom does not face limited, or lessened, competition for that service.

Designated Access Services	Initial Pricing Principle	Final Pricing Principle
<i>Residential local access and calling service offered by means of Telecom's fixed Telecommunications network</i>	Telecom's standard price for its price-capped residential local access and calling service offered to end-users by means of its fixed telecommunications network in the relevant market, minus 2 %.	Telecom's standard price for its price-capped residential local access and calling service offered to end-users by means of its fixed telecommunications network in the relevant market, minus actual costs saved.
<i>Bundle of retail services offered by means of Telecom's fixed telecommunications network</i>	<p>Wholesale price for the bundle is:</p> <p>(a) first, - $a \times \left(\frac{(100 - b)}{100} \right) = c$ where – a = retail price of bundle b = discount (as a percentage) off the retail price for that bundle (benchmarked against comparable bundles in comparable countries) c = the wholesale price</p> <p>(b) second, if Telecom's price-capped residential access and calling service is included in the bundle, deduct from c a discount of 2% of the standard price.</p>	<p>Wholesale price for the bundle is:</p> $a - b = c$ <p>where – a = retail price of bundle b = discount off the retail price for that bundle c = the wholesale price</p>
<i>Retail services offered by means of Telecom's fixed telecommunications network as part of a bundle of retail services</i>	<p>Wholesale price for the retail service is:</p> <p>(a) in the case of Telecom's price-capped residential access and calling service: $a \times \left(\frac{(100 - b)}{100} \right) = c$ where – a = imputed retail price for the service b = is a 2% discount c = is the wholesale price</p> <p>(b) in the case of any other telecommunications service offered by Telecom in a bundle of retail services by means of its fixed telecommunications network: $a \times \left(\frac{(100 - b)}{100} \right) = c$ where – a = imputed retail price for the service b = discount (as a percentage) off the imputed retail price for the service (benchmarked against comparable retail services in comparable countries) c = is the wholesale price</p>	<p>Wholesale price for the retail service is:</p> $a - b = c$ <p>where – a = imputed retail price for the service b = discount off the imputed retail price for the service c = the wholesale price</p>

1 Interpretation

In this schedule, unless the context otherwise requires, -

actual costs saved means the net costs saved by supplying the service on a wholesale rather than a retail basis to the access seeker

avoided costs saved means the difference in the access provider's costs between supplying the service on a wholesale basis only and supplying the service on both a wholesale and retail basis, including a share of retail-specific fixed costs

fixed telecommunications network means -

- (a) any lines between a user's premises and the local telephone exchange or equivalent facility;
- (b) any fixed PSTN;
- (c) any telecommunications links between fixed PSTNs;
- (d) any fixed PDN;
- (e) any telecommunications links between fixed PDNs
- (f) any value-added telecommunications services associated with telecommunications services provided by those assets

forward-looking common costs –

- (a) means those costs efficiently incurred by the service provider in providing the service that are not directly attributable to providing an additional unit to that service; but
- (b) does not include any costs incurred by the service provider in relation to a TSO instrument

local loop network means that part of Telecom's copper network that connects the end user's building (or, where relevant, the building distribution frames) to the handover point in Telecom's local telephone exchange or distribution cabinet (or equivalent facility)

third generation cellular telephone network means a cellular telephone network based on the IMT 2000 set of radio technology standards as recognised by the International Telecommunication Union

TSLRIC, in relation to a telecommunications service, -

- (a) means the forward-looking costs over the long run of the total quantity of the facilities and functions that are directly attributable to, or reasonably identifiable as incremental to, the service, taking into account the service provider's provision of other telecommunications services; and
- (b) includes a reasonable allocation of forward-looking common costs

- Appendix 3 -

Technical Accounting Requirements for the Calculation of the Net Cost of the TSO

The Telecommunications Act 2001 provides extensive technical accounting requirements in relation to the TSO:

- a) Within 60 days of the end of the financial year, liable persons and Telecommunications Service Providers [TSP] must provide prescribed information to the Commission [s 81(a) of the TA]. This currently includes:
 - i) By s 83, the TSP must calculate the net cost of complying with the TSO.
 - ii) By s 84, in calculating the net cost of compliance, TSPs must:
 - Consider the range of direct and indirect revenues and associated benefits from providing services to commercially non-viable customers, less the costs of providing those services;
 - Consider the provision of a reasonable return on incremental capital employed in providing services to commercially non-viable customers;
 - Provide information on profits from new telecommunications services with telecommunication capability not available to established telecommunication services;
 - Provide information to the Commission on losses from telecommunications services other than services that the TSO instrument requires the TSP to provide. These losses must be excluded from the net cost calculation.
- b) Within 60 days of the end of the financial year, liable persons and TSPs must provide a report by a qualified auditor attesting to whether the information provided complies with the requirements of the Commission [s 81(b)].

The accounting requirements prescribed for the draft determination and the final determination concerning the TSO (net cost, revenue received, and amounts payable), as specified in ss 88 and 92, include:

- a) If the TSO instrument does not contain a specified amount, the Commissioner must determine the net cost of complying with the TSO instrument for the TSP. This includes:
 - i) All material information that relates to the calculation of the net cost, providing that such information would not unreasonably prejudice the commercial position of the TSP;

- ii) The amount of revenue that the TSP receives from providing telecommunications services by means of its PSTN;
- b) The amount of revenue that each liable person in relation to the TSO instrument receives from providing telecommunications services by means of its PSTN;
- c) Any reduction to the amount that a TSP will receive from all liable persons for not complying with the TSO instrument;
- d) A statement that identifies the revenue basis, pursuant to s 85(1), in respect of each amount of revenue to which the draft determination applies. The Act requires the Commissioner to determine the appropriate revenue basis in relation to revenue received by a liable person in relation to the TSO instrument, and provides the following guidance:
 - i) The Commissioner may use a revenue basis with no weights or a weighted revenue basis where some or all revenue amounts are multiplied by a weight;
 - ii) In using a weighting, the Commissioner must disclose the particulars of the weighting attached to that amount of revenue;
- e) The revenue amounts that will be used for the purposes of calculating the amount payable by each liable person in relation to the TSO instrument;
- f) In the draft determination, the Commissioner must disclose the methodology applied in determining the amounts liable;
- g) In the final determination, the Commissioner must determine the amount payable by each liable person in relation to the TSO instrument to the TSP for the financial year. Section 93 provides the relevant methodology for calculating the amount payable by liable persons:

	Calculation Formula
Where the TSO instrument contains a specified amount, the formula is:	$\frac{a}{b} \times (c - d)$
Where the TSO instrument does not contain a specified amount, the formula is:	$\frac{a}{b} \times \left(\frac{e}{f + b} \right) - d$
Where: a = amount of revenue of the liable person in relation to the TSO instrument in providing telecommunications services by means of its PSTN or by TSP's PSTN. b = sum of the amounts of revenue of each liable person c = the specified amount d = amount of any reduction for non-compliance with TSO instrument e = net cost of TSP complying with TSO instrument f = amount of revenue of the TSP from providing telecommunications services by means of its PSTN	

I THE LIMITATIONS AND CRITIQUES OF DISCOURSE THEORY

Given the interdisciplinary nature of this project, there are various applicable theoretical frameworks that could inform this thesis. One DT strength, however, is that its highly articulated theoretical nature allows a broad range of analysis under the umbrella of the overarching theoretical framework. However, DT is subject to various critiques. Consequently, the following centres around three critiques:

- a) Critiquing post-structuralism;
- b) Critiquing post-Marxism; and
- c) Critiquing Laclau and Mouffe's DT.

The following discussion considers each of these criticisms in turn.

A Critiques of Post-Structuralism

Devenney argues that it is “unsurprising ... that post-structuralist theory is viewed with scepticism by many political scientists, since it entails a critical interrogation of the objects, subjects and tools naturalised by disciplines” (Devenney, 2002, p. 176). For DT, Devenney acknowledges that critics argue that post-structuralism undermines:

- 1) the moral justification for the critique of inequality by questioning the universal nature of morals, drawing on the socially constructed nature of moral justification;
- 2) the autonomy of the subject responsibility, by arguing the openness of subject construction, and by implicating the State, rendering it partly responsible; and
- 3) liberal democracy by rendering ‘representation’ relative, questioning the legitimacy of representative institutions, and by doubting ‘democratic will formation’, by holding that the ‘will of the people’ is a convenient fiction (Devenney, 2002).

Thus, critical theorists argue that post-structuralism provides no basis for political action, by providing no political vision or means of achieving a better society, as each position is inherently open and contingent (Epstein, 1996). In part, this misses the point of DT, which suggest no particular political motivation, other than politics itself, but holds that the specifics of politics is at the local and particular level. Thus, the critical theory critique is perhaps overstated, as not all philosophical movements have a particular political persuasion: having no 'particular' politics is not necessarily an indictment as this is common of many political, intellectual, and artistic movements. In conclusion, though, as indicated in Chapter five, post-structuralism requires structuralism, and equally, post-structuralism may be ‘more’ political than structuralism, for it does not provide a definition of ‘universal’ political movements

(such as class, etc) and is open to different, unique, local, and particular conceptions of the political.

Thus, the next section considers how Marxists critique this post-Marxist claim to 'particular' politics.

B Critiques of Post-Marxism

The criticisms of the post-Marxist aspects of DT concentrate on 'class reductionism', and readings of Althusser and Gramsci (Geras, 1987).

- 1) DT is critiqued as being a 'performative' act of identification as post-Marxist, rather than politics or a theory. By hegemonically constructing subjects as '*post-Marxist*' and '*post-Marxist*' (Laclau & Mouffe, 2001), critics argue that this form of Marxist revisionism provides little to address current political concerns. Consequently, if Marxist theory is the 'opiate of the people', then Laclau and Mouffe are the 'the opiate of the intellectuals' (Geras, 1997).
- 2) For DT, antagonism is a key concept, but the post-Marxist conception of antagonism receives significant criticism. Laclau and Mouffe distinguish theoretically between relations of subordination and relations of oppression (2001, pp. 152-159), parallel to the structure/struggle distinction in Marxism. The first level of critique, here, results from Laclau and Mouffe holding that relations of subordination cannot be antagonistic:

simply, a set of differential positions between social agents, . . . a system of differences which constructs each social identity as positivity" . . . "Serf", "Slave", and so on, do not designate in themselves antagonistic positions; it is only in terms of a different discursive formation, such as "the rights inherent to every human being", that the differential positivity of these categories can be subverted and the subordination constructed as oppression. This means that there is no relation of oppression without the presence of a discursive "exterior" from which the discourse of subordination can be interrupted (Laclau & Mouffe, 2001, p. 154).

An identity is antagonistic when, through displacement of the democratic discourse, the relation of subordination is discursively constructed as an external imposition:

[I]t is only by coming out of itself and hegemonising external elements that the identity of the two poles of the antagonism is consolidated. The strengthening of specific democratic struggles requires, therefore, the expansion of chains of equivalence which extend to other struggles (Laclau & Mouffe, 2001, p. 182).

Consequently, Marxists argue that DT reduces Marxism's historicised-material account of the working class through the tendency of the productive forces' development to the moment which forms its culmination: "the capitalist relations of production constitute an insurmountable obstacle to the advance of these productive forces" (Geras, 1987, p. 77). This reduction allows them to describe struggles over the "general" development of the forces of production as struggles

external to their *capitalist* development (and the class antagonism that permeates it).

- 3) Laclau and Mouffe incorporate Althusser's overdetermination. However, critics claim that DT overstates the use of 'overdetermination' within Althusser's work, without due regard to Althusser's own comments on the incorporation of the concept:

[N]ot only do Laclau and Mouffe misunderstand and therefore misappropriate [Althusser's] concept of overdetermination, but that this misappropriation fatally undermines the book's analysis of social space and of the possibilities for political action within that space" (Lewis, 2005, p. 3).

Laclau and Mouffe reinterpret Althusser use of overdetermination by focusing on analysing overdetermination as a broad socio-economic concept, which allows DT to expose 'essentialism' within Marxist theory. It is the argument that the social constitutes itself as a symbolic order:

the symbolic or overdetermined character of social relations ... implies that [these relations] lack an ultimate literality which would reduce them to necessary moment of an immanent law ... (Laclau & Mouffe, 1985, p. 98).

For Lewis, this is the key movement for Laclau and Mouffe, demonstrating how overdetermination justifies a conception of the social as an open system comprised of largely determined, but open subjects (Lewis, 2005). Althusser incorporates the term 'overdetermination' into his essay, "On the Materialist Dialectic" (1968), acknowledging that he borrows the term from psychoanalysis. Lewis argues that when one borrows a term this does not mean that the word remains unchanged from its origin or that Althusser suggests anything like Laclau and Mouffe's assertion that 'overdetermination' equals 'symbolic' equals 'not tied down to any real' (Lewis, 2005). In fact, in "Contradiction and Overdetermination", Althusser states that he "is not particularly taken by this term" but that he "chooses to use [overdetermination] in the absence of anything better, both as an *index* and as a problem ..." (Althusser, 1968, p. 84).

Thus, there is a marked difference in the conceptions of overdetermination between Laclau and Mouffe and Althusser:

Viewing Marxism as a discursive practice, [Laclau and Mouffe] see Marx as not having searched for understanding of the material constraints on human life, but instead as having devised a new social imaginary, new terms of social cleavage ... historical materials on does not, on this view, explain class conflict but merely legitimates it (Rustin, 1988, p. 153).

Lewis concludes by arguing that due to Laclau and Mouffe's privileging of discourse as the sole experiential medium (and the concomitant denial of a subject's lived relation with a material real distinct from that subject's ideas about that real), this is really 'a thoroughly idealist political philosophy' (Lewis, 2005).

- 4) Critics argue that Laclau and Mouffe 'evade' the origins of hegemony, irrespective of advocating for Foucauldian genealogy. For critics, a 'proper' understanding of hegemony requires consideration of the Russian

context, particularly including Plekhanov's emphasis on the importance of political struggle, class alliances, and consciousness (1978). For critics, Laclau and Mouffe concentrate too heavily on how and why hegemony articulates some agents or some interests rather than others (as hegemony creates social agents). This is problematic as they deny any pre-discursive social positions, and by arguing that interests are simply articulated identities, Laclau and Mouffe effectively conceptualise away social structure and relations of exploitation (Critchley, 2005).

Therefore, the criticisms of the post-Marxist movement within Laclau and Mouffe's DT concentrate on challenging the politics of DT arguing that it is only a performative act of identification, critiquing the notion of externalising antagonism through the distinction between oppression and subordination, by challenging the incorporation of overdetermination by arguing that there is a marked difference in the meaning of the terms as originally used by Althusser and how it is used by Laclau and Mouffe, and finally, challenging the use of hegemony by ignoring the insights of the Russian context. To these critiques, Laclau and Mouffe hold that it is necessary to move beyond Marx in its original form, but acknowledge that DT requires Marx.

1 Response to post-Marxist criticisms

Laclau and Mouffe respond by explaining why it is "necessary today to go beyond the theoretical and political horizon of Marxism" (1987, p. 106). Laclau and Mouffe pay tribute to the ability of Marxist theory to illustrate the tendency in the 'self-development' of capitalism and associated antagonisms, but "the analysis is incomplete and ... parochial" (1987, p. 106):

Today we know that the dislocation effects which capitalism generates at the international level are much deeper than the ones foreseen by Marx. This obliges us to radicalise and to transform in a variety of directions Marx's conception of the social agent and of social antagonisms (Laclau & Mouffe, 1987, pp. 106-107).

In terms of politics, Laclau and Mouffe argue that it is necessary to abandon the "myth of the transparent and homogeneous society – which implies the end of politics" (1987, p. 106). Consequently:

[b]y locating socialism in the wider field of the democratic revolution, we have indicated that the political transformations which will eventually enable us to transcend capitalist society are founded on the plurality of social agents and of their struggles. Thus the field of social conflict is extended, rather than being concentrated in a 'privileged agent' of socialist change. This also means that the extension and radicalisation of democratic struggle does not have a final point of arrival in the achievement of a fully localised society. There will always be antagonisms, struggles, and partial opaqueness of the social; there will always be history (Laclau & Mouffe, 1987, p. 107).

Laclau and Mouffe acknowledge that Marxists and post-Marxists will not see eye-to-eye, but argue that the movement is necessary:

We believe that, by clearly locating ourselves in a post-Marxist terrain, we not only help to clarify the meaning of contemporary social struggles but also to give Marxism its theoretical dignity, which can only proceed from recognition of its limitations and of its historicity. Only through such recognition will Marx's work remain present in our tradition and our political culture (Laclau & Mouffe, 1987, p. 108).

In summary, though, as post-structuralism requires structuralism, so post-Marxism requires Marxism. Thus, the next section considers the criticisms of Laclau and Mouffe's work itself.

C Critiques of Laclau and Mouffe

There are a variety of criticisms of Laclau and Mouffe's DT. With a highly articulated theoretical construction, DT is a target for theoretical, philosophical, and political critique. Torfing acknowledges that a recurrent series of critiques of DT predominantly "concentrate on the consequences of adopting a discourse theoretical perspective" (Torfing, 2005, p. 18). The following section presents ten common critiques of DT, beginning with Torfing challenging five common DT critiques.

- 1) Critics allege that DT leads to idealism, based upon the assertion that the discursive character of all social meanings and identities leads to a denial of the independent existence of reality. As discussed, though, this constitutes a misreading of the constitutive nature of discourse, for DT does not deny that matter exists independent of our consciousness, thoughts, and language, but rather that nothing follows from matter alone:

In fact, the social forms that render matter intelligible are neither passive reflections of an immanent essence of the experienced objects nor are they constituted by the omnipotence of the experiencing subject that reduces the object to a thought object. Rather, intelligible social forms are constructed in and through different discourses ... First, the discursive construction of matter in and through processes of discursive signification also tends to produce or at least reinforce particular subjectivities ... Second, matter does not merely await a particular signification that is stamped upon it by discourse. Discursive forms play an active role in constructing that which they signify ... Third, the discourses that construct matter as a meaningful object are constantly disrupted by dislocation and social antagonism. The dream of constructing a final vocabulary that captures the world as it really is must be abandoned because there is always an unrepresentable kernel that prevents the symbolic order of a discursive system from fixing social meaning in a way that completely absorbs matter. Hence, discourse theory subscribes not only to the realist idea of independently existing matter, but also to the materialist insistence on an irreducible distance between the form and matter (Torfing, 2005, p. 18).

- 2) Some critics argue that DT holds a 'nihilistic relativism'. This 'relativist gloom' flows from DT's foundational lack, and thus, if everything is discursive, it is then impossible to defend a particular set of claims about truth, good, bad, right, or wrong. Torfing acknowledges that DT does hold that there is "no such thing as an extra-discursive truth, morality, or ethics", but moves to argue that conclusion is incorrect, as "we never find ourselves in a situation where we are prepared to contend that all claims are equally valid" (Torfing, 2005, p. 19). Consequently:

We are always part of a particular discourse that provides us with a set of relatively determinate values, standards, and criteria for judging something to be true or false, right or wrong, good or bad ... However, the different cultures, traditions, and contexts that condition our truth claims are constantly dis-articulated and re-articulated through processes of mutual learning, political struggles, or violent conflicts. No discourse can be protected from contestation and contamination as their boundaries are continuously breached and redrawn (Torfing, 2005, p. 19).

- 3) Critics challenge DT's explanatory capacity, doing little more than describing the articulatory practices within and between various discourses, and thus, understanding, but not explaining social, political, and culture life. Howarth cautions against seeing understanding and explanation as opposites (Howarth, 2000), while Winch emphasises that explanation always requires some understanding and that "explanation is an attempt to complete our initial and somewhat fragmented understanding of a state of affairs" (Winch, 1990). For Torfing, this represents an 'appropriate' blurring of the lines between explanation and understanding:

In keeping with Winch's blurring of the lines separating explanation and understanding, we might ask how discourse theory attempts to explain things. Discourse theory opposes the causal explanations of social phenomena, which harness empirical events to the yoke of universal laws. It does not accept that the task of the social scientist should be to establish a covering law (Hempel, 1966) or to reveal the intrinsic causal properties of social objects (Bhaskar, 1988). Instead discourse theory aims to describe, understand, and explain how and why particular discursive formations were constructed, stabilised, and transformed. In order to reveal the necessary and sufficient conditions for discourse to be shaped and reshaped in a particular way, discourse theory employs a contextualised conceptual tool kit that includes important concepts like dislocation, hegemony, social antagonism etc. In other words, invoking Aristotle's distinction between different scientific rationalities, we might conclude that discourse theory is a phonetic rather than epistemic theory. It aspires to both understand and explain social phenomena, through contextualised studies of the historical conditions in which discourse emerge and take effect (Torfing, 2005, pp. 19-20).

- 4) Critics challenge DT's ambition to criticise the discourses that it analyses (Torfing, 2005, p. 20). For Torfing, the argument is incorrect:

First, discourse theory does not discard the emancipatory values of the Enlightenment. We are thrown into a political culture pregnant with emancipatory hopes that we do want to abandon. However, the problem is that emancipation is both necessary and impossible ... Power has no deep foundation and resistance to power entails only the substitution of one power configuration for another, which on pragmatic grounds, we judge more agreeable. Second, discourse theory does not support the unrestrained proliferation of difference, which legitimises all political projects in the name of diversity. Certainly, we should, both analytically and in the kind of politics we pursue, try to avoid reducing difference to identity and the alterity of the other to our domesticated image of the other. However, the idea of a limitless diversity is self-defeating, since diversity can only exist to the extent that we are willing to repress those forces that seek to eliminate diversity. Intolerance towards the intolerant is the condition of possibility for tolerance. Finally, while it is true that all ethical and normative claims can be deconstructed, this does not mean that critique is impossible. We just have to rethink the very idea of critique. Critique should not consist of measuring a current state of affairs against some pre-established yardstick, defining once and for all what is right and good. It should rather take the form of an attempt to deconstruct the closure invoked by ethical, normative, political, cultural, economic, and other discourses ... The conceptual and pragmatic undecidables that are revealed through deconstruction escape definition and institutionalisation, but are captured by the promise of something yet to come and always endlessly deferred. As such, we can criticise the eminently deconstructable law in the face of the indeconstructable justice, which is always justice to come. We can do that by confronting the totalising closure it produces with the aporias it fails to eliminate and which point towards an unrealised sense of justice (Torfing, 2005, p. 20).

- 5) DT is 'guilty' of the liar's paradox, a performative contradiction: in claiming to be anti-essentialist, DT makes an essentialist stipulation about the world as having no essence. Torfing challenges this critique:

If we accept that the claim about the absence of a deep essence of the social world is a decontextualised and thus truly universal statement, there is no logical escape from the performative contradiction. However, a closer analysis of the semantics reveals the paradox as being based on a fallacy of equivocation. The essence ends up meaning two different things in the claim 'there is no essence' and the claim that 'the stipulation of the absence of essences is an essentialist stipulation'. Hence, when discourse theorists claim that there is no essence they take issues with the metaphysical idea of a positively defined essence that is given in and by itself and from which it is possible to derive a whole series of determinate effects. Now, for the claim that there is no such essence to be an essentialist stipulation it requires that the affirmation of the absence of a deep ground of social identities produces a series of determinate effects. This requirement is exactly what is not fulfilled. Whereas it is possible to derive a whole series of effects from a positively defined ground, nothing which follows from the affirmation on an abyss of pure negativity ... the rejection of an essentialist grounding of the social world cannot fulfil the role of a new essentialist ground (Torfing, 2005, p. 21).

- 6) Critics challenge the arcane nature of the writing style, which is common to post-structural political theorists. Epstein criticises Laclau and Mouffe's call for radical democratic politics, as "no one outside a small group of academics familiar with this vocabulary could be expected to understand it" (Epstein, 1988). For Epstein, the political movement is more about 'performance' than politics.
- 7) The Hegelian critique of discourse theory concentrates on the inherent contradiction of presupposing exactly what it omits: the totality of an inter-subjective rationality expressed in the medium of a shared language. There is a performative contradiction in Laclau and Mouffe in that the gesture by which they deny the possibility of a shared universe of meanings, they demonstrate that their argument relies on such a totality for its intelligibility. Hegelian's argue that what their argument says (the constative value of the propositions) and what it does (its performative character) by being said are in contradiction with each other: hence, a "performative" contradiction (Dallmayr, 2004, pp. 43-44). The post-Hegelian critique challenges DT 'excessive' emphasis on autonomous action and initiative, as evidenced by the incorporation of Luxemburg's 'logic of spontaneism' (Dallmayr, 2004, p. 45).
- 8) Bertram accuses Laclau and Mouffe of fetishising 'dislocation', as the direct result of democracy and widespread capitalism (1995, p. 83). For Bertram, "[Laclau and Mouffe] are uninterested in any alternative to consumerism and representative (liberal) democracy" (1995, p. 83). For Bertram, the belief in democratic hegemony results in Laclau and Mouffe too easily accepting everything that comes with it, for the simple reason that there is not one unified thing that everyone can believe in (a transcendental guarantor). Thus, this lack of unity allows a freedom never previously attainable: "we are free only once we are splintered, once we are dislocated; we are never truly unified and neither is society, but we are free because we have multiple choices" (Bertram, 1995, p. 84). Thus, Bertram critiques DT for trying to have it both ways: the fetishising of

dislocation is understandable if they warrant it with creating the pluralism they praise, but Bertram argues that unity can never be formed of disunity.

- 9) Zizek argues that Laclau and Mouffe's construct hegemony upon a contradiction between the view of society and the view of the subject. For DT, society is open, due to the notion of impossibility and possibility. For Zizek, in DT, each subject position is closed to other subject positions. Zizek argues that it is not possible to have an open society with closed subject positions; it is necessary to have lack in both society and the subject. For Zizek, Lacanian theory of subjectivity provides an answer, as subjects are developed on the existence of a lack. Within psychoanalysis subjects constitute in the lack, and society is lacking (Zizek, 1985; Butler, Laclau & Zizek, 2000).

McRobbie (1992), similarly, argues that DT simply replaces one set of limits with another set of limits, instead of removing the limits of structural theory. That is, in privileging 'openness', identity is key and any struggles over the meanings of identities are inherent to those identities. McRobbie argues that:

[w]hen contingency is combined with equivalence and when no social group is granted a privileged place as an emancipatory agent, then a form of relational hegemony can extend the sequence of democratic antagonisms through a series of social displacements (McRobbie, 1992, p. 724).

McRobbie challenges the utility of DT relating identity to openness and politics, when there is no scope for 'taking sides'. McRobbie argues:

... if emancipatory politics amounts to nothing more than ad hoc arrangements between "popular forces" which emerge contingently, then the moment of critique and contestation can be evaded. That is, any practice that one might be engaged in is potentially as important and useful as that of anyone else, or at least there would be no grounds for denying this. In this case, if various practices are "combined", there is always the possibility that they will "add up" to emancipatory results. Or not. At any rate, there are no grounds for critique as a central element of political struggle (McRobbie, 1992, p. 731).

With respect to both Zizek and McRobbie, the tension with regards to 'openness' is no more than saying that it is impossible to achieve final closure of structure and identity, but equally, in order for politics and due to human nature, there is a necessity to close identities in the short term. Thus, this is a duality – there is closure, but that closure is an illustration of the openness of systems or identity, for that which names the closure is unnameable or outside the structure. The structure is tendentially closed, but open – both society and subjects.

- 10) Critics challenge DT for the impossibility of conceiving of a universal, or of conceiving of a universal that is tendentially empty. Gasché, for example, is concerned with Laclau and Mouffe emptying of the universal, arguing that it is a reaction to the rationalist, universalistic discourse of capitalism. For Gasché, a certain notion of universality is necessary for any constitution of the social and political:

[the universal] is absolutely essential for any kind of *political* interaction, for if the latter took place without universal reference, there would be no political interaction at all: we would only have either a complementarity of differences which would be totally non-antagonistic, or a totally antagonistic one, one where differences entirely lack any commensurability, and whose only possible resolution is the mutual destruction of the adversaries (Gasché, 2004, 18).

Gasché prime question is how empty is empty? The construction of radical democracy, premised upon hegemony and the logic of the empty signifier, must hold that the universal is empty of or absent of an ultimate telos. It is not that Gasché is attempting to posit fixity to the universal space, and in fact, Gasché acknowledges the ability for various particulars to fill the universal space, but rather how does an empty signifier fill such a space, and why does it have to be empty? For Gasché, these arguments imply that the space is not altogether empty, as not all particulars are capable of filling the space (Gasché, 2004, pp. 32-33).

In conclusion, there are a series of challenges to DT. This is common to any philosophical movement. The development of the logics of critical explanation, in response to the methodological and normative deficits of DT, cannot satisfy all of these concerns, but they do help to shift DT, rendering it more approachable and usable.

- Appendix 5 -

Tables of Submissions to the Ministerial Inquiry into Telecommunications

SUBMISSIONS RECEIVED ON THE ISSUES PAPER: MIT

Submission No.	Name
001	Paul Budde Communication Pty Ltd
002	Tasman Milk Products Ltd
003	Australian Information Industry Association (AIIA)
004	Noel Reid
005	Neil James
006	The Resource Rentals for Revenue Association (International)
007	Standards New Zealand
008	Nokia NZ Ltd
009	Craig Morley
010	Telecommunications Users Association of New Zealand (TUANZ)
011	Kim Robinson
012	Deaf Association of New Zealand (Inc)
013	Minister for Rural Affairs
014	Geoff Hindle
015	John Crook Consulting
016	Auckland City Libraries
017	Kiwi Co-Operative Dairies Ltd, New Zealand Co-Operative Dairy Company, The New Zealand Dairy Board
018	David L Hopkins
019	John Small
020	Credit Suisse First Boston NZ Ltd
021	Peter Campbell
022	Clear Communications Ltd
023	Ericsson Communications Ltd
024	POTENZ International Ltd
025	New Zealand Business Roundtable
026	Vodafone Airtouch Ltd
027	Sky Network Television Ltd
028	Frontier Economics
029	Network Economics Consulting Group Pty Ltd
030	Rural Women of New Zealand
031	Television New Zealand
032	IHUG
033	Christchurch City Council
034	Broadcast Communications Ltd (BCL)
035	Vodafone New Zealand Ltd
036	Information Technology Association of New Zealand (ITANZ)
037	Employers and Manufacturers' Association (EMA)
038	Southland District Council
039	Riverton Community Board
040	Progress Southland

041	Federated Farmers of New Zealand (Inc)
042	Newcall Group Ltd
044	Graeme Everton
045	New Zealand Manufacturers Federation Inc
046	Royal New Zealand Foundation for the Blind
047	Disabled Persons Assembly (NZ) Inc
048	Telstra Saturn Ltd
049	Walker Wireless Ltd
050	Telecom Corporation of New Zealand Ltd
051	Consumers' Institute
052	Wellington Regional Chamber of Commerce
053	Nortel Networks Australia Pty Ltd
054	Geraldine Telecom Subscribers' Action Committee
055	UnitedNetworks Ltd

SUBMISSIONS RECEIVED ON THE DRAFT REPORT: MIT

Submission No.	Name
001	David Annett
002	Janice Gray
003	Web InterNet Ltd
004	Michael Causley
005	H Jessurun
006	Grant Elder
007	Rob WM Dowler
008	Alan Brown
009	Bill Keir
010	Roger Duke
011	Brian Bithell
012	Perce Harpham
013	Neil James
014	Tricia Fitzgerald
015	Alan Kemp
016	South Catlins Promotions Inc
017	Te Horo Telecom Users' Group
018	The Internet Group Ltd (IHUG)
019	Nokia NZ Ltd
020	Julie Pearse
021	Nikolas Haden
022	Campaign Against Foreign Control of Aotearoa
023	Henk Klos
024	Dr Nevil Brownlee
025	Deaf Association of New Zealand (Inc)
026	Don Wallace & Associates Ltd
027	The Australian Information Industry Association - AIIA
028	Telecommunications Users Association of New Zealand - TUANZ
029	Ministry of Consumer Affairs

030 Kim Robinson
031 Ministry of Education
032 Muaupoko Co-Operative Society
033 Royal Foundation for the Blind
034 eVentures New Zealand Ltd
035 Nortel Networks
036 DPA (New Zealand) Ltd
037 J Paterson
038 Telstra Saturn Ltd
039 Communications Centres Service Centre (New Zealand Police)
040 Vodafone New Zealand Ltd
041 New Zealand Business Roundtable
042 Strath Taieri Community Board
043 Broadcast Communications Ltd
044 Clear Communications Ltd
045 Mike Fouhy
046 Ericsson Communications Ltd
047 Maui Solomon
048 Rural Women New Zealand
049 WorldxChange Ltd
050 Consumers' Institute
051 Television New Zealand Ltd
052 Alcatel Australia Ltd
053 IBM New Zealand Ltd
054 Telecom Corporation of New Zealand Ltd
055 Australian Electrical & Electronic Manufacturers' Association Ltd
056 Paul Buddle Communication Pty Ltd
057 Federated Farmers of New Zealand (Inc)
058 Information Technology Department, University of Canterbury
059 Call Plus Ltd / Free InternetAccess Ltd (i4free) / Attica Communications Ltd
060 Tony Girling
062 The Internet Society of New Zealand Inc.
063 E-Phone Ltd
064 Lex Dean

MIT: SCHEDULE OF HEARINGS

Time	Monday 14 August	Tuesday 15 August	Wednesday 16 August	Thursday 17 August	Friday 18 August
9:00am –10:30am	050 Telecom Corporation of New Zealand Ltd	035 Vodafone New Zealand Ltd	036 Information Technology Association of New Zealand (ITANZ) 051 Consumers' Institute	<i>Panel in Recess</i>	<i>Panel in Recess</i>
11:00am –1:00pm	050 Telecom Corporation of New Zealand Ltd	017 Kiwi Co-Operative Dairies Ltd, New Zealand Co-Operative Dairy Company, The New Zealand Dairy Board 018 David L Hopkins 021 Peter Campbell	047 Disabled Persons Assembly (NZ) Inc 041 Federated Farmers of New Zealand (Inc)		
2:00pm –3:30pm	048 Telstra Saturn Ltd	030 Rural Women of New Zealand 045 New Zealand Manufacturers Federation Inc	<i>Panel in Recess</i>		
4:00pm –5:30pm	026 Vodafone Airtouch Ltd	044 Graeme Everton			

Time	Monday 21 August	Tuesday 22 August	Wednesday 23 August	Thursday 24 August	Friday 25 August
9:00am –10:30am	031 Television New Zealand 001 Paul Budde Communi- cation Pty Ltd	022 Clear Commu- nications Ltd	010 TUANZ	<i>Panel in Recess</i>	<i>Panel in Recess</i>
11:00am –1:00pm	027 Sky Network Television Ltd	022 Clear Commu- nications Ltd	029 Network Economics Consulting Group Pty Ltd		
2:00pm –3:30pm	049 Walker Wireless Ltd	047 Disabled Persons Assembly (NZ) Inc			
4:00pm –5:30pm		025 New Zealand Business Roundtable			

Time	Monday 28 August Auckland	Tuesday 29 August Auckland	Wednesday 30 August Christchurch	Thursday 31 August	Friday 1 September
9:00am –10:30am	037 Employers and Manufacturers’ Association (EMA) 006 The Resource Rentals for Revenue Association (International)	050 Telecom Corporation of New Zealand Ltd	033 Christchurch City Council	<i>Panel in Recess</i>	<i>Panel in Recess</i>
11:00am –1:00pm	024 POTENZ International Ltd 016 Auckland City Libraries	050 Telecom Corporation of New Zealand Ltd	038 Southland District Council		
2:00pm –3:30pm	012 Deaf Association of New Zealand (Inc) 011 Kim Robinson	055 UnitedNetworks Ltd 046 Royal New Zealand Foundation for the Blind	054 Geraldine Telecom Subscribers’ Action Committee		
4:00pm –5:30pm	042 Newcall Group Ltd				

CROSS SUBMISSIONS ON THE DRAFT REPORT: MIT

Submission No.	Name
001	CLEAR Communications Ltd
002	Vodafone New Zealand Ltd

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