

# TELEPHONES AND LAW-MAKING FOR TOKELAU

TONY H ANGELO

*Professor of Law, University of Victoria, Wellington*

## I. INTRODUCTION

The Prologue and Act 1 in this drama have just been played. It is the purpose of this paper to report on the story thus far and set the stage for Act 2, which will see the successful operation of a Tokelau telephone company, and for the final Act, which may see the replication of the telecommunication model in other fields of Tokelau endeavour.

On 1 August 1996 the Tokelau Amendment Act 1996<sup>1</sup> came into force. This Act is significant because for the first time a Tokelau national body<sup>2</sup> is given the power to make law for Tokelau. This is a significant step in the devolution of government powers from the New Zealand central government to the authorities in Tokelau, and a milestone for Tokelau on the path towards self-determination in the context of the United Nations Charter requirements relating to decolonisation.

## II. TOKELAU LEGISLATIVE POWER

The Tokelau government had over a number of years sought a legislative power to exercise in respect of domestic matters. Most recently the matter received some attention in the context of the visit of the Special Mission from the United Nations to Tokelau in July 1994,<sup>3</sup> and the New Zealand government then indicated its intention to legislate for a law-making power for the General Fono of Tokelau.

The First Reading of the Tokelau Amendment Bill<sup>4</sup> was on 19 December 1995<sup>5</sup> and, following that, the Bill was referred to the Foreign Affairs and Defence Select Committee. Between First and Second Reading the Bill was substantially reorganised to put clear focus on the law-making powers.<sup>6</sup> It was also at this stage that the proposal to add a preamble in both Tokelauan and English was discussed. In the event, the Bill moved through the House very promptly.<sup>7</sup> The House dealt first with the report back from the Select Committee, the Second Reading and the adoption of a Preamble, and at 1.05pm on May 23,<sup>8</sup> the Bill passed its Third Reading and was referred to the Governor-General who gave the royal assent on the 10 June 1996. The date

1 Act 31 of 1996.

2 The power is conferred on the General Fono by s 3A. A legislative power at the local body level is vested in each village by Regulation 18 of the Tokelau Village Incorporation Regulations 1986.

3 See United Nations Visiting Mission Report: A/AC 109/2009, in R Gordon, *Tokelau: A Collection of Documents and References Relating to Constitutional Development* (Tokelau Administration, Apia, 1995) at 247.

4 Bill Number 147-1.

5 NZPD vol 552, 1995: 10860.

6 Clauses 4C-5 in the First Bill were renumbered as clauses 3A-3G. The substance of the Bill was not significantly altered, but the order of the clauses were rearranged to put the primary purpose of the Bill, the conferral of law-making powers, at the beginning of the Bill and consequently at the beginning of the amended principal Act of 1948.

7 On Budget Day 1996.

8 NZPD vol 555, 1996: 12703.

for the commencement of the statute was subsequently set by Order in Council at 1 August 1996.<sup>9</sup>

The net result is that the General Fono has a power "to make rules for the peace, order, and good government of Tokelau".<sup>10</sup> In the exercise of its law-making power it will be governed by its own procedures<sup>11</sup> and though there are rules relating to promulgation,<sup>12</sup> failure to observe them does not result in the nullity of the provisions.<sup>13</sup> Of the several controls on the exercise of the Tokelau law-making power, the most significant is that of the Administrator of Tokelau to disallow any rule within a period of 30 days of notification of the exercise of the rule-making power to him.<sup>14</sup>

### III. TOKELAU TELEPHONE INSTALLATION PROJECT 1996

As fate would have it, a topic for the exercise of this rule-making power was pressing itself on the Tokelau legislators at the same time as the Tokelau Amendment Bill was being considered in Parliament in New Zealand. Early in 1996 the project installation team for a telephone system for Tokelau arrived on the atolls, and began the construction and installation work necessary for the reticulation of telephone services on the atolls and the connection of each atoll's telephone system with that of the other two atolls and with countries world-wide via satellite.

Communications in Tokelau have been by VHF radio<sup>15</sup> between the atolls and internationally through the Tokelau Apia Liaison Office in Western Samoa. Telecommunications was one of the significant matters of infrastructure raised in the Voice of Tokelau in 1994.<sup>16</sup> The current project is expected to come on line at the end of 1996 and will for Tokelau be the culmination of a massive development with a budget of approximately \$4 million, a substantial portion of which has been provided by the Tokelau Administration itself.<sup>17</sup>

The telephone service will, for inter-atoll and international calls, depend on the Intelsat satellite and use the DAMA<sup>18</sup> digital technology. Inter-country connections will, it is expected, be provided to Western Samoa by the Western Samoan Telecommunications Corporation, to New Zealand by Telecom New Zealand Limited,<sup>19</sup> and to Australia and the rest of the world

9 The Tokelau Amendment Act Commencement Order SR 1996/180.

10 Section 3A.

11 Section 3C.

12 Section 3D.

13 Section 3D(3).

14 Section 3F.

15 Apart from a very short period in the late 1980s during which there was some experience of a telephone system.

16 See above n 3, and United Nations Visiting Mission: Tokelau's Voice "New Wind, New Waters, New Sail - The Emerging Nation of Tokelau", para 22-24, in R Gordon, Tokelau: A Collection of Documents and References Relating to Constitutional Development (Tokelau Administration, Apia, 1995) at 240.

17 Tokelau will contribute approximately \$NZ1.25 million, which was saved from special revenue received under the treaty on tuna fishing between Pacific Island States and the United States of America. The balance was by the New Zealand Government, the United Nations Development Programme (UNDP) and the International Telecommunications Union (ITU).

18 Demand Assigned Multiple Access.

19 For these purposes Tokelau must deal with two companies. The first is Telecom Corporation of New Zealand Limited, the company which is the New Zealand official signatory for Intelsat purposes, see below n 21. The second company is Telecom New Zealand Limited, a wholly owned subsidiary of Telecom Corporation of New Zealand Limited. In dealing with the first company in relation to an Intelsat space segment, TELETOK (Telecommunication Tokelau Corporation) contracts with Telecom New Zealand Limited which is the representative of the first company in these matters. Telecom New Zealand Limited has established the Office of Signatory Affairs within its structure to

by Telstra of Australia. When the various inter-country connection agreements have been settled, Tokelau will join the international telecommunications world under country code 690. To move to that point requires that Tokelau enter into a number of commercial agreements which will cover the inter-country arrangements, the satellite space segment, and the international accounting system. Additionally there are the arrangements with the New Zealand government in respect to the use of the radio spectrum for Tokelau transmissions<sup>20</sup> and a user access agreement with Telecom New Zealand Limited which is the agent of the designated New Zealand official signatory for Intelsat purposes.<sup>21</sup>

At its meeting of November 1996, the General Fono of Tokelau was confronted with the question of how to move from the point of the availability of a telephone system in the sense of installed hardware, to the making of telephone calls and the managing of the domestic and international telecommunications business that that would generate. The primary concern was with the ownership and management of the Tokelau telecommunications system. The Tokelau government had before it two basic options. One was to continue the communication system under the aegis of the Tokelau government, and therefore as an operation of the Tokelau Public Service.<sup>22</sup> The radio communication system is operated by a small group of public servants in the Department of Transport and Communications.<sup>23</sup> The current operation of that system does not involve telephones, 24 hour service, international operators, or accounting processes. The other alternative was to establish a corporation to operate the telephone system as a business. A secondary question was whether any such corporation would operate the business itself, in conjunction with services obtained from the Tokelau Administration, by buying services from international suppliers, or by entering into a joint venture or a management contract with some third party.

Whichever option was to be chosen, it was of importance that, before the system became operational, somebody would be available to deal with the

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act as a non-discriminatory single point of contact between operators and Telecom New Zealand Limited in respect of its Intelsat duties. In respect of the international carriage of calls TELETOK would deal with Telecom New Zealand Limited in its own right.

20 Prima facie telecommunication in Tokelau is unregulated by law. The only Tokelau legislation is the Tokelau Post Office Regulations 1991/3. At one stage the New Zealand Post Office Act 1959 extended to Tokelau with the consequence that the use of the radio spectrum was regulated by the metropolitan legislation. The current New Zealand metropolitan legislation on these matters has not been extended to Tokelau (The Telecommunications Act 1987 and the Radiocommunications Act 1989). In a technical sense therefore it is not Tokelau law. In the international context however, those laws are relevant because the New Zealand metropolitan authorities are responsible internationally for the use of the radio spectrum in the state of New Zealand (of which Tokelau is an integral part, see s 3 of Tokelau Act 1948).

21 This is in accordance with the Agreement Relating to the International Telecommunications Satellite Organisation "Intelsat", in force from 12 February 1973, which New Zealand ratified on 5 January 1972: New Zealand Appendix to the Journals vol 1, 1973, A25.

22 Tokelau Amendment Act 1967/38. The Director of the Department of Transport Communications Youth and Sports is appointed on term contract by the Tokelau Public Service Commissioners who are delegates of the State Services Commissioner of New Zealand. The Director has a staff of about 10 in the communications division of the Department; the Director reports to the Faipule responsible for the Department as Minister, who in turn is responsible to the General Fono in respect of national matters concerning transport and communications. The day to day operation of the Department is therefore in the hands of the Director and his staff, and the political responsibility lies with the Faipule and his two colleagues in the Council of Faipule. Tokelau Amendment Act 1967 s 7 gives the State Services Commissioner of New Zealand the power to delegate any of his or her powers in respect of the Tokelau Public Service. This was exercised in 1993 and 1994 in favour of two Commissioners, one Tokelauan and one non-Tokelauan.

23 One of the seven departments of Tokelau government.

international operators and to deal with Telecom Corporation New Zealand Limited. Tokelau and its administration have a developing legal personality both in domestic and international law, but the Director of Transport and Communications of the Tokelau Administration would arguably enter into a contract as agent for a department of the New Zealand government. On the other hand, a corporation would enter into contracts and licensing arrangements on its own behalf.

The commercial and management aspects of the operation weighed heavily with the General Fono. The General Fono was very aware of the substantial investment in the system, that effectively the telephones would be the only revenue producer in Tokelau and that an international telephone system involved a 24 hours a day, 7 days per week activity. The General Fono decided to set up a corporation to operate the telecommunications services of Tokelau. This was done in the presence of reports on various aspects of the telephone project by the Director of Transport and Communications and in the presence of advice from the Senior Expert Telecommunication Regulation of the ITU whose services were provided to Tokelau under the ITU project grant.

The corporate model and the particular form of management was chosen because the General Fono wished control of the telecommunications system to be in Tokelau and, for business and administration reasons, to separate the telephone activities from other government business. In particular, the telephone operation would require a new set of accounting skills and procedures and, from a costing and management point of view, it was seen as easier to deal with those factors within the corporate structure. For their part, the Directors of the Corporation would need and have access to financial data of a kind not available to departments of government. On the government side, it was seen as appropriate that the revenues and expenditures of the telephone operation be clearly identifiable. The corporatisation of telecommunications was also seen as a potential model for other government activities such as transport and energy supply.

#### IV. THE TOKELAU RULES

Draft legislation for a telecommunication corporation was prepared in late October 1996 patterned on model legislation recommended for general ITU use. That model legislation was considerably modified by the ITU advisor to reflect the Tokelau social circumstance, the size of the Tokelau community and the fact that the new corporation was not taking over an existing telephone operation from a government department. Tokelau had no legislation on corporations,<sup>24</sup> and none on telecommunications other than what is found in the Tokelau Post Office Regulations 1991.<sup>25</sup>

The draft was discussed by the Council of Faipule<sup>26</sup> and with the Director of Transport and Communications, and as a result several minor amendments were made to it. At a first meeting with the General Fono on 3 November 1996, the ITU advisor explained the background to the telecommunications system that Tokelau had installed and the general pattern of the management

<sup>24</sup> The only other corporations in Tokelau are the villages, which were incorporated by the Tokelau Village Incorporation Regulations 1986/319.

<sup>25</sup> SR 1991/3. See above n 20.

<sup>26</sup> General Fono Rules, Rule 11(1), reads: "Where the General Fono is not in session, business of the General Fono shall be referred to the Council of Faipule which shall after such consultation as it thinks fit take the decisions necessary for the effective administration of Tokelau".

needs and principles involved in international telecommunications operations. He further spoke of the desirability of having a well founded management system in place before the telephone system became operational. He spoke of the need to negotiate international contracts, and identified the specific accounting needs of the telecommunication system, and of the international settlement procedures. On 4 November 1996 there was further debate on the issues and the draft prepared by the ITU consultant underwent some further changes. The main matters debated in the General Fono related to the management board, to the ownership of the assets, to the relationship of the corporation<sup>27</sup> to the General Fono, and to the commencement date of the various provisions.

The General Fono was concerned that the ownership and management of the assets remained in Tokelau. The ownership of the system by a Tokelau corporation under the control of a Tokelau Board with reporting functions to the General Fono was seen as sufficient to meet the concerns of the General Fono. Full detail of the directorate was not worked out and it was decided that the first Board of the corporation should be an interim board and that the General Fono would review the composition of the board at the next meeting of the General Fono which was scheduled to take place in January 1997. The General Fono would then reconsider the size of the Board, the qualities required of Directors and the process of appointment of Directors. The interim board was agreed upon to provide an easy transition from the known public service structures which relate to the existing radio communication system. The interim board comprises the three Faipule and the General Manager.<sup>28</sup>

The General Fono addressed three matters relating to the timetable for the corporation. The first was the date for the establishment of the corporation. This needed to be a sufficient time after the General Fono meeting to allow for preparation for the operation of the corporation, but also to be before the completion of the installation project which was scheduled for mid-December 1996. With a view to settling inter-country connection agreements before the end of 1996 and to providing an adequate regime for the transfer of assets on the completion of the installation project, the date of 9 December 1996 was fixed.<sup>29</sup> The other two matters concerned the transfer of assets and the employment situation of those members of the Tokelau Public Service who were dealing with communications in the Tokelau Administration at the date of commencement of operation of the corporation. The setting of a date for the transfer of assets was deferred to the Council of Faipule to notify as an executive act because of the uncertainty as to which

27 Some of the cultural significance of the development and of the legislation is seen in connection with the translation of the word *corporation*. There is within Tokelau tradition no exact counterpart of this European legal concept. There is the notion of individuals and of groups of individuals, but the fiction of a legal person is not known. An appropriate translation for the word "corporation" by use of Tokelauan concepts was accepted as being *fakatalapotopotoga*. However, given the lack of cultural analogy the word *kamupani*, which is the general Tokelauan usage to refer to foreign business corporations, was used. The discussion that flowed from this however brought with it a new range of questions because it was known that companies have shareholders and if therefore TELETOK was a company, who were the shareholders? The result of the debate on this issue was that *kamupani* would be used in Tokelauan to designate a legislatively created corporation which, for the time being at least, would not be a corporation limited by shares but which would, as a creation of the General Fono of Tokelau, be accountable to the people of Tokelau through its reporting to the General Fono.

28 Who is, until the corporation itself appoints a General Manager, the Director of Transport and Communications.

29 The Tokelau Telecommunication Rules 1996, Rule 1(2).

date would be appropriate.<sup>30</sup> The transfer of employees from the communications section of the Tokelau Administration to the corporation was treated similarly with power in the Director to specify which public servants would not become employees of the corporation on the transfer date.<sup>31</sup>

## V. CONCLUSION

The approval of the proposal by the General Fono put in place the Tokelau Telecommunication Rules 1996 and thereby a basic structure for the future operation of telecommunications systems in Tokelau. A consequential amendment was made to the Tokelau Post Office Regulations 1991 which indirectly shifted control of the use of the radio spectrum in Tokelau to the appropriate authority of the New Zealand Government.<sup>32</sup>

On the basis of this legislation, the Director of Transport, Communications, Youth and Sports moved to negotiate the inter-country connections and other necessary contracts and formally to prepare for the operation of the Board of the corporation from 9 December 1996 and subsequently for the transfer of assets and the employment of staff.<sup>33</sup>

The General Fono was anxious not to legislate simply to follow dominant overseas patterns. The rules adopted clearly do follow a common international pattern. The General Fono was however satisfied that the foreign influence related primarily, if not exclusively, to the use of the corporate form. Subject to that fact the degree of control over the corporation and the extent to which the form could be adapted to and fit in with Tokelau tradition and customary demands was high.<sup>34</sup> The legislation was seen to provide a very flexible base from which local initiatives may be developed and onto which local characteristics can be grafted as is felt appropriate.

<sup>30</sup> The Tokelau Telecommunication Rules 1996, Rule 12, also see Rule 1(3).

<sup>31</sup> The Tokelau Telecommunication Rules 1996, Rule 13, also see Rule 1(3). The decision has been made by the Director to declare all relevant Tokelau Public Service posts as non-transferable. In the short term at least TELETOK is likely to use the services of Tokelau Public Service staff on a secondment basis. Indirectly, this decision has averted any difficulty that may have arisen from the potential ultra vires nature of Rules 13 and 14. See s 3B of the Tokelau Amendment Act 1996 and Tokelau Amendment Act 1987 Part I.

<sup>32</sup> Tokelau Post Office Amendment Rules 1996. These rules amended regulation 47(1) of the Tokelau Post Office Regulations 1991 to read: "Radio transmitters not to be possessed or operated without licence or approval —

(1) Subject to subclause (2) of this regulation and to regulations 53 and 54 of these regulations, no person shall have in that person's possession, or operate, a radio transmitter in Tokelau except pursuant to a licence, granted by Telecommunication Tokelau Corporation (TELETOK) acting on the advice of the appropriate telecommunication authority of the New Zealand Government".  
The Rules also repealed Regulations 48, 49, 50 and 51 and altered Regulation 55 (offences) accordingly.

<sup>33</sup> The Tokelau Telecommunications Rules 1996, Rules 12 and 13. The Council of Faipule has not yet set a date for the operation of these sections. The operation of the telephone system is scheduled to begin on 10 March 1997.

<sup>34</sup> A number of particular questions such as the fiscal liability of the corporation remain for the General Fono to decide at a future date.