InternetNZ

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Telecommunications Act Review

2nd February 2015

1. Introduction

1.1. InternetNZ greatly appreciates the opportunity to provide the Ministry for Business, Innovation and Employment (MBIE) with our thoughts on reviewing the Telecommunications Act. We commend MBIE for the consultative approach to this important task.

1.2. We also want to thank you for the engagements that we have had so far on this topic, and in working with InternetNZ to take into account a broader range of voices and perspectives on these issues. We believe the sessions that we have run so far on issues relating to the broader industry post-2020 have been successful in exactly that broadening of perspectives. It is in that spirit that we seek to further engage in this response.

1.3. Our response to you is structured as follows:

a) Firstly, we consider the historical intent behind the Telecommunications Act, as we see it, and give our perspective on the intent of parliament in establishing the legislative and regulatory regime that we currently hold.

b) Secondly, we will demonstrate the legacy of this Act in terms of lowering prices for Internet Users in New Zealand; increasing competitiveness in the market for telecommunications service provision, with the corresponding drop in access pricing, and the increased innovation and investment that has occurred in this market as a result. We will seek to answer what we see as the problem that this review may wish to solve.

c) Thirdly, we will reflect upon the principles of the Telecommunications Act, and how these may guide this review.

d) Fourthly, we will highlight what we believe are the priority issues with the Telecommunications Act that we believe this review needs to consider. We will discuss a broader set of issues beyond the Telecommunications Act itself that are worth considering in the context of parallel reviews of related legislation, to ensure that New Zealand has the legislative foundation to make the most of the opportunities and potential that the Internet provides. In doing so, we have not yet considered the sequencing issues that may arise from this.

1.4. This review is a timely opportunity for MBIE to consider these issues, and the potential of this review for our industry is exciting. We look forward to continued engagement and discussion with MBIE, and the rest of the industry, as we progress through this process.

Jordan Carter

Chief Executive

2. Historical Context

2.1. The underlying principle of the Telecommunications Act from 2001 to 2011 was the promotion of competition – primarily infrastructure-based competition. Competition has consistently been shown to be the most efficient driver of investment and consumer benefit globally as well as in New Zealand. Throughout the 2000s the incumbent, Telecom New Zealand (TelecomNZ), consistently threatened to withhold investment if regulation was introduced but in reality did the opposite; when regulation was withheld Telecom didn't invest, when regulation was introduced they invested heavily in order to win the competition.

2.2. The mechanism used by the Act to facilitate the promotion of competition was relatively simplistic it relied upon an access seeker actively wishing to seek access to the incumbents network, attempting to negotiate that access commercially and only if those negotiations failed could they seek redress via regulation through the Commerce Commission. In 2001, with TelstraClear, there was such an access seeker which went through the process but failed in its bid to gain regulated access to Telecom's network.

2.3. This demonstrated that the first phase of legislative intervention to encourage competition in telecommunications provision had not yet had the desired result; and as such, the further legislative changes introduced in the 2006 amendments to the Telecommunications Act strengthened the regime through which access seekers could gain access to network bottlenecks.

2.4. This iterative, ex-post development of our Telecommunications legislation next moved in 2011, with the structural separation of TelecomNZ into Chorus and what is now Spark and with Chorus winning the bulk of the UFB contract there was an implicit acceptance that Chorus would have a wholesale monopoly on copper and fibre access for much of New Zealand. It was assumed that the existing regulatory environment would largely suffice for the copper network and that a negotiated capped price in conjunction with competition from the regulated copper network would suffice for the fibre network until 2020. The negotiations between the Government and Chorus/Telecom also resulted in a number of concessions to Chorus/Telecom through the Act such as the moratorium on price change until December 2014 and the inclusion of s18 2a, the avoidance of doubt clause. The s157AA review was put in place deliberately and for good reason. By 2020 there was every expectation that:

a) fibre services would be well established;

b) the UFB roll out would be complete;

c) fibre investment would turn from new deployment to maintenance;

d) the contracted price for fibre would cease to apply;

e) access seekers could seek access to layer 1 fibre services;

f) it was possible that advanced mobile and wireless telephony and broadband would provide competition to fibre (and vice versa) in some segments of the market;

g) with the decision not to allow Chorus to cut copper services, copper might also provide competition to fibre in some segments of the market – particularly other LFC areas; and rural;

h) by default the Commerce Commission, if there was insufficient competition, would be expected to oversee regulation of fibre or conversely the deregulation of copper and wireless.

2.5. Some of these expectations in 2011 were hypothetical and the purpose of the review was to establish a new baseline and a new infrastructure stocktake to allow a future government to assess whether the old policy objectives had been met and whether new policy objectives were now necessary.

2.6. The review was required to commence before 2016 and report in 2019 presumably to allow sufficient time to do a comprehensive review and if necessary have legislation ready to pass before contracts and moratoria expired. All this seemed eminently sensible.

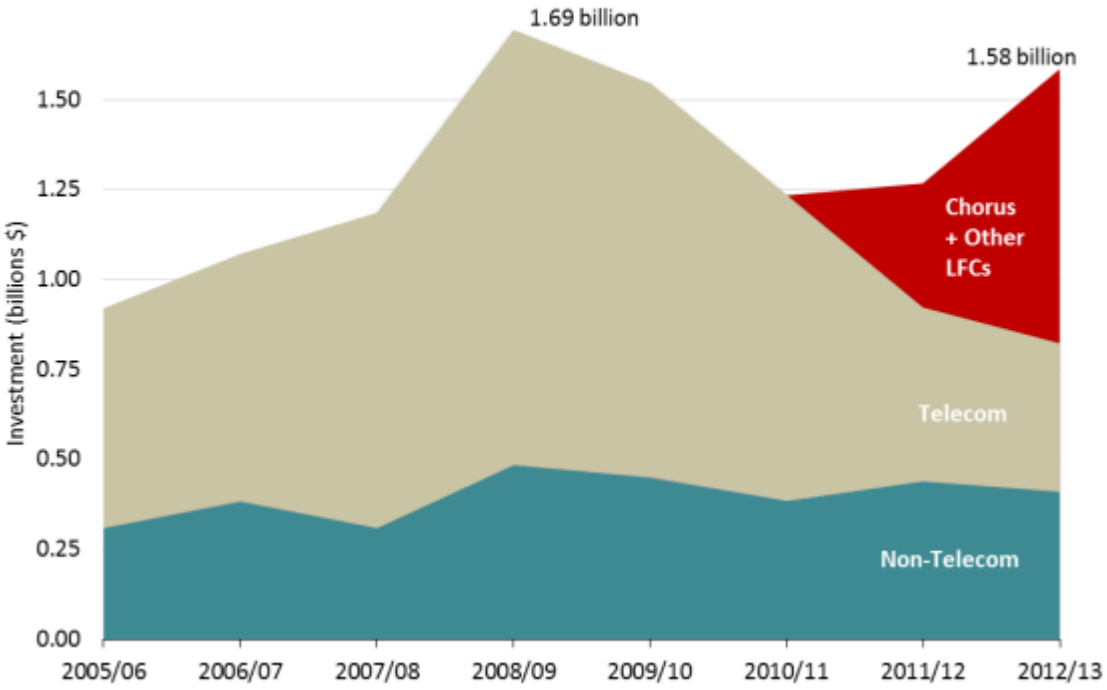
2.7. The lingering doubt that was present in 2011 for those who had worked with the previous iterations of the Telecommunications Act was whether the legislation was sufficiently specified and drafted. Too much emphasis seemed to be given to the terms and conditions of TelecomNZ separation and too little emphasis given to making changes to regulate a changing copper environment in the period between 2011 and 2020.

3. Outcomes for Internet Users and what are we trying to solve?

3.1. This iterative approach to telecommunications legislation has produced good outcomes for the industry, competition and for New Zealand Internet Users. All of the below come from the Commerce Commission's Telecommunications Market Monitoring Reports.

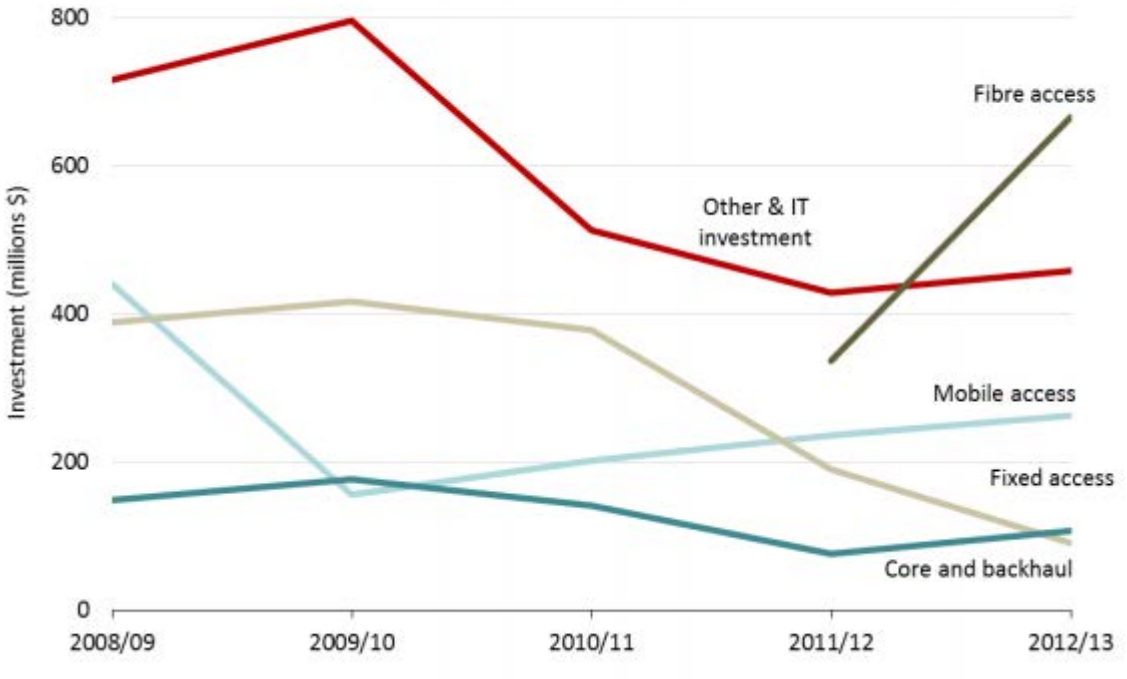
3.2. Firstly, investment has continued in the industry, and while this goes through periods of peaks and troughs representing spikes in network building, there is a relatively consistent pattern of firstly increased, and then continuing, levels of investment across the industry as a whole:

Figure 1: Telecommunications investment



3.3. The mix of investment has however changed, reflecting the changing priorities, particularly due to the introduction of the UFB from 2011/12:

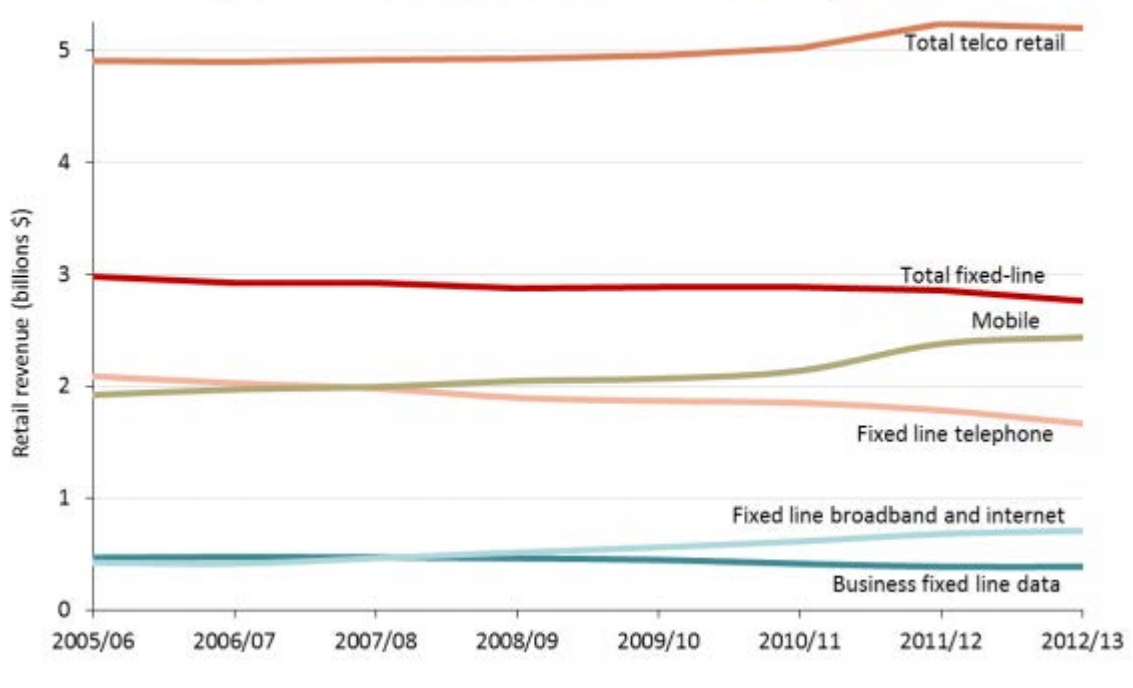
Figure 2: Investment by component



3.4. We highlight that despite the concerns of the New Zealand industry, this history of legislative intervention does not seem to have dampened investment in New Zealand telecommunication thus far. Instead, the mix of investments has changed as technology has developed, and as the competitive forces in the industry have pushed consumer behaviour towards different solutions.

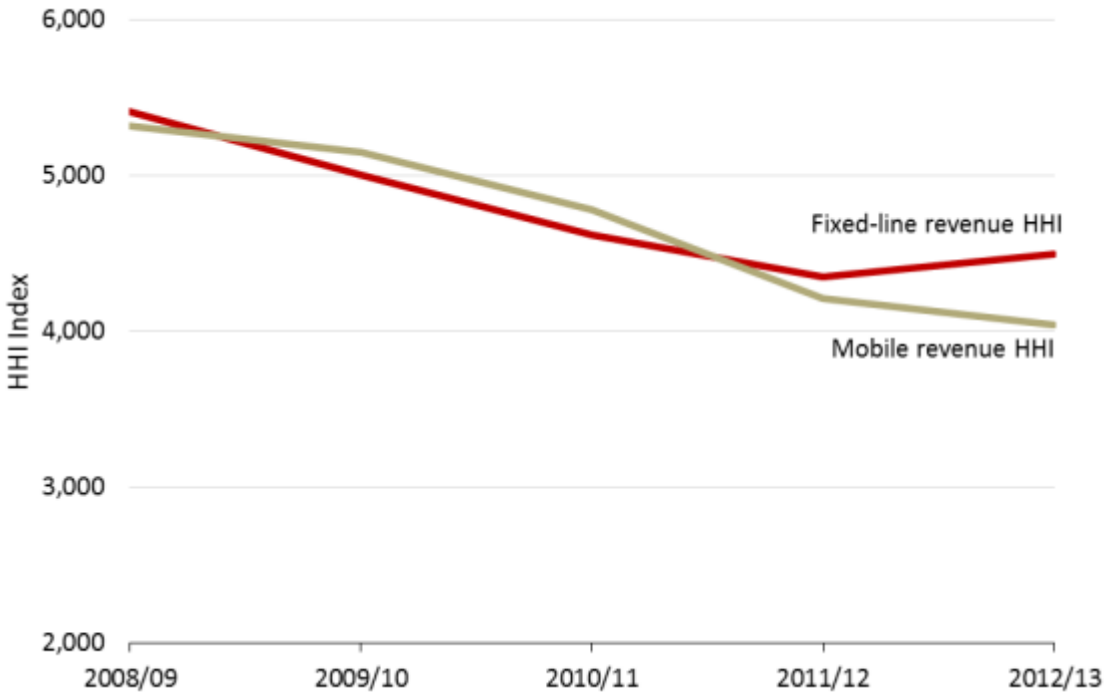
3.5. Retail revenues within the industry have also managed to remain level throughout this period, though again there have been changes in the revenue mix. Most relevantly, however, it appears that the last iteration of legislative change coincided with the first significant increase in total telecommunications industry revenues since 2005/06:

Figure 7: Telecommunications retail revenues by service



3.6. While revenue mixes have changed, so has the level of competition, with less concentration of market shares demonstrating that there has been an increase in competition:

Figure 9: Retail revenue HHIs for fixed-line and mobile markets



3.7. Meanwhile, the consumer has benefitted from these trends – in lower prices, in more usage and in better quality of connections, as the following charts demonstrate:

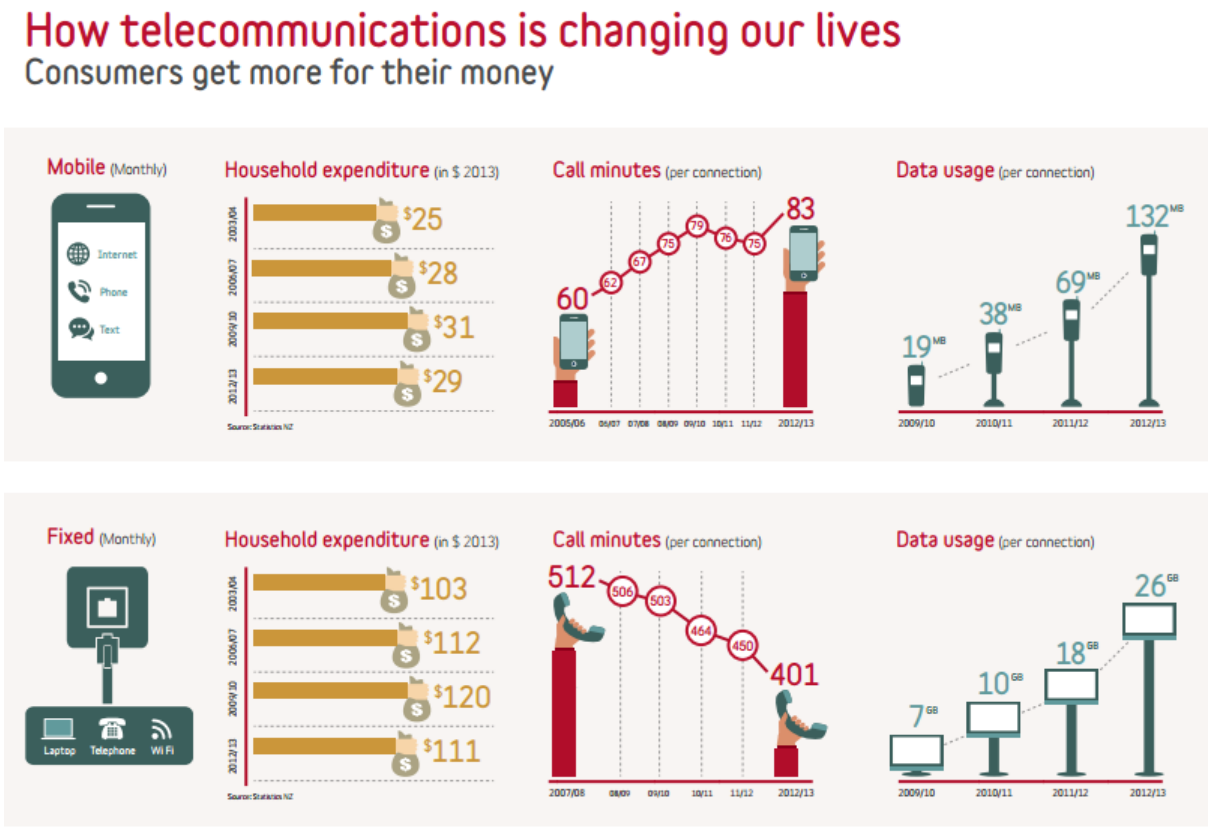
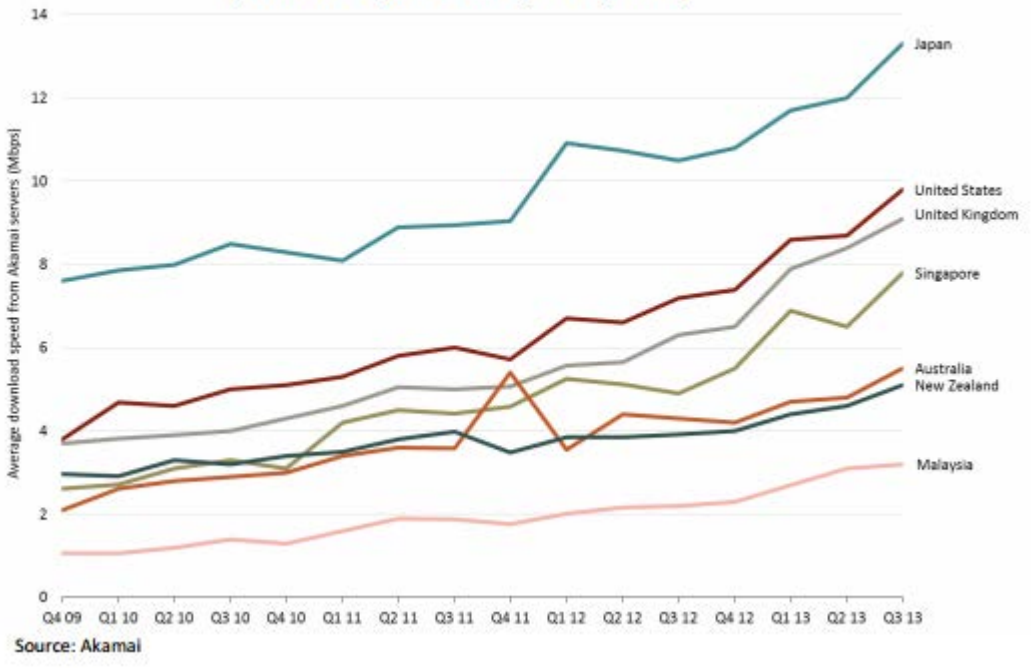


Figure 17: Average download speeds by country



Source: Akamai

3.8. This is but a brief, cursory survey of the results of this period – but on first look, they indicate to InternetNZ that the current legislative regime has done well by the industry and consumers in appropriately balancing all of the components of "the long term benefit of end-users". We have seen investment continue; overall revenues maintained; competition and consumer benefits increased. What then is the problem to which we seek to solve with this review?

3.9. We see some problems that are finally being demonstrated through finally going through the full extent of the legislated process, in finally going through both the Initial Pricing Principle (IPP) process, and now the Final Pricing Principle (FPP) process, on the price of copper-based services. To reflect on some of the stages of this debate:

a) Debate has centred on what the Government's policy intention was, whether that intention had been correctly codified in legislation and whether the Commission had interpreted it correctly. The doubts were exacerbated when the Prime Minister effectively said the Commission had got it wrong and MBIE commenced the previous Section 157AA review to overturn the Commission's determination.

b) A meeting of all the parties, which included Chorus, was quite clear in saying that all would work to help Chorus if it could show that its apparent financial problems were not of its own making. Chorus could not do that and the subsequent EY report commissioned by the Government confirmed that Chorus could relatively easily solve its problems itself.

c) Chorus has subsequently continued to challenge the Commission's interpretations of the Act through courts and in legal advice included in submissions – they have every right to do that. Increasingly though it is becoming apparent that the basis of their challenges are dependent upon aspects of the Act that were not amended in 2011 such as the TSLRIC pricing principle and STD service descriptions. Aspects that were clearly intended to facilitate competition and price regulation in the pre-2011 environment.

3.10. The FPP process has yet to play out, but already it appears to be having results that buck the trend of achievement that we illustrate above. Already in 2015, all of the major telecommunications companies have indicated that their prices will need to rise as a result of this process; despite the Government's effective subsidy of $1.5 billion in rolling out the UFB, and despite what has been a legacy that has been quite healthy for all industry participants to date.

3.11. Our conclusion on this matter is that we hope MBIE will continue to proceed with considered caution in this area. Our legislative regime has been through a number of carefully considered iterations. These have cumulated in a market that seems to be delivering well to the range of parties that have an interest – network builders, service providers and consumers. We are seeing a noisy set of issues play out at the moment that seem to be contrary to that trend – but we should not seek to only accommodate these challenges without being mindful of what has already been achieved, and the legislation that helped achieve it.

4. Underlying Principles in the Telecommunications Act

4.1. There seem to be two, or possibly three, underlying principles that are in need of examination including examination of the alignment between the underlying principles and government policy intentions.

4.2. The first is the principle of competition including the purpose statement of the Act, to promote competition...., and the legal and regulatory mechanisms used to achieve competition. Core components of such an examination should include a clear statement of the Government's future policy intentions. For example:

a) does it believe that the combination of regulating access to layer 1 fibre combined with partial competition from mobile, fixed wireless and copper will be sufficient to generate on-going investment and productivity for the long term benefit of end-users? or

b) Does it believe that something other than promoting competition is required to promote investment and if so what?

c) How do incentives to promote investment in one segment of the market avoid disincentives in other segments of the market?

d) What place does direct government investment (e.g. UFB) have when promoting (or in conjunction with) investment rather than competition?

e) What mechanisms are in place to correct any misalignment between government policy intentions and implementation?

4.3. The second is the principle of independent regulation, how far that independence extends and whether the regulatory agency has the necessary tools to monitor and regulate the sector?

4.4. The third "possible" underlying principle is technology neutrality. The Government has through the UFB sought to promote the deployment of fibre technology however it has largely done this through direct investment rather than by attempting to skew the regulatory regime. There is perhaps a need to confirm the underlying principle of technology neutrality (in conjunction with independent regulation) in regard to the regulatory environment.

4.5. Other possible principles, for example transparency [add others] are important but we consider them largely as "givens" and therefore may just require endorsement rather than detailed review.

4.6. As important as underlying principles are, equally important is the need for a clear commitment to those principles (upon which the legislation is based and approved by Parliament) and that commitment needs to be clearly reflected in the policy decisions of the Government, otherwise the situation we have recently experienced where the agency implementing the legislation is placed in an intolerable position will be repeated.

5. The Scope of the Review

5.1. The scope of the review is in part prescribed by the s 157AA legislation in that it identifies a range of issues that must be reviewed i.e. there is scope to extend the list but not reduce it without amending the legislation.

5.2. InternetNZ has long maintained that the convergence of telecommunications, broadcasting and computing technologies and markets around Internet infrastructure and protocols needed to be matched by aligned policy, legislative and regulatory environments. We continue to hold that view. This is not to say that there needs to be shared legislation or approaches; rather, that these different regimes need to be considered with reference to each other, and that a common set of principles would be useful across both.

5.3. As we commented in our response to the Radiocommunications Act discussion document; critical to any alignment of the converging sectors is the need for an agreed strategy or at least a single strategy that was understood by all the parties. To have two or three different strategies or no articulated strategy for regulating converging markets seems to be a recipe for disaster.

5.4. Whether alignment is reached by extending the scope of the S 157AA review to include other technologies and markets such as broadcasting and radio communications or through a separate, but coordinated, review(s) is largely a matter of the resources available to undertake the work.

5.5. We appreciate the comments made by both the Minister and by MBIE staff in that this review also presents an opportunity to consider opportunities for reform of other legislation. While MBIE has asked us to consider whether these remain fit for purpose, we instead think of this as an opportunity to invite consideration of the wider set of opportunities and potential that this review could tap into.

5.6. Below is the same information that we provided the Minister of Communications, Amy Adams, in our briefing to her of October 2014. The issues we highlighted in this were as follows:

ISSUE	ACTIVITY
Connectivity - The UltraFast Broadband and Rural Broadband Initiatives (UFB & RBI): we applaud the great leap forward that these initiatives represent and the Government's renewed commitment to them during the election.	We see need to start talking about how these exciting extensions will be implemented (particularly in rural New Zealand) and what comes next (particularly the regulatory environment) following the UFB.
Overseas connectivity & datacaps: Our main overseas connection with the world is the Southern Cross Cable. It is currently sufficient but in the longer term a new cable will provide significant benefits of security, long term competition and greater capacity.	We see the sense in this being private sector led and recognise the incentives that the Government can provide. Are there other incentives that the Government can provide?
Fair Intellectual Property Law: IP law is an area that needs further work, and in particular our copyright regime needs further attention to	This is a cross-portfolio and cross-sector issue requiring coordination. Other countries are also struggling with the same issues in most cases

ISSUE	ACTIVITY
bring it in line with the new Internet era.	unsuccessfully. A single informed New Zealand view is needed.
Surveillance & privacy: highly emotive subjects which the Internet amplifies.	This is also a cross-portfolio and cross-sector issue requiring co-ordination and constant attention. Our major concern is that other sectors do not fully understand the Internet – again, much clearer and informed views are needed – whether or not a single agreed view is achievable.
Government's role in the ICT industry: The Government wears many hats in the ICT industry – direct investor and network operator, regulator, trade negotiator, key user and demand stimulator, legislator, funder and provider. Many see greater potential to leverage this government involvement in ways that could produce better outcomes for New Zealand businesses and consumers.	Another cross-portfolio and cross sector issue – we believe that government responses to the issues of surveillance and privacy and business use of the Internet may provide vehicles to advance the Government's other roles such as regulator, trade negotiator and in procurement.
Business Use of the Internet & Productivity: New Zealand businesses are lagging in uptake and use of the Internet. This is restricting us in achieving the gains we hoped for from the investments in the UFB and RBI.	We consider this an area where there are opportunities for government intervention which may provide significant benefits for the NZ ICT sector as well as the wider commercial sector.
Human Rights online: As the use of the Internet grows, new questions are emerging about how human rights translate into the online world. This raises questions not only about what rights are relevant, but how they are enforced in a complex jurisdictional context and also in a conceptual way of determining what rights these are.	Another cross-portfolio issues that is also global in its nature. We believe with New Zealand's reputation in this area we can play a global leadership role here.

These issues are highly relevant to realising the full potential of the Internet in New Zealand, and we hope that this process is one where these may be explored as well.

5.7. Secondly, realising opportunity has been a focus of the engagements that InternetNZ and MBIE have run together throughout 2014. We encourage MBIE to continue to consider the feedback received in these.