

InternetNZ

Regulating communications for the future
Review of the Telecommunications Act 2001

November 2015
Public Version (there is no confidential version)

1. Introduction

1.1. We welcome the Government's Convergence programme and we appreciate the opportunity to make this submission on the review of the Telecommunications Act.

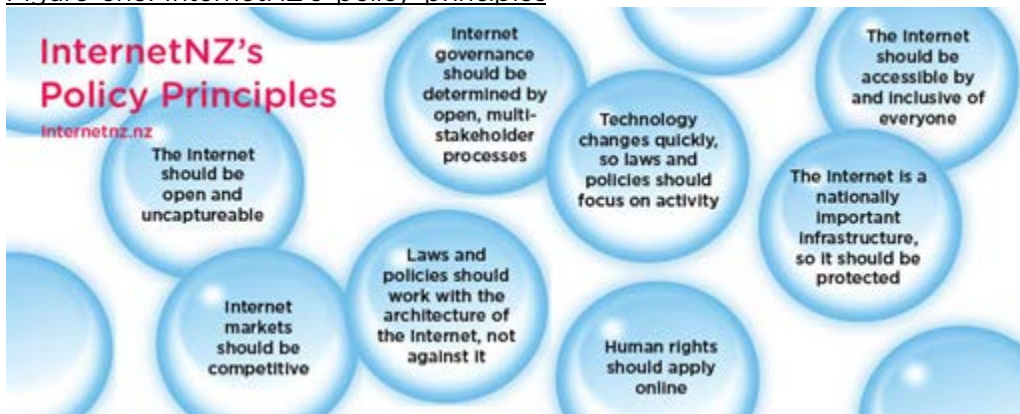
We are committed to an open and uncaptureable Internet

1.2. InternetNZ is a membership-based not-for-profit organisation and is the designated manager for the .nz country code top level domain.

1.3. Our vision is of a better world through a better Internet. To help bring that vision about, our mission is to promote the Internet's benefits and uses, and protect its potential. We advocate the on-going development of an open and uncaptureable Internet, available to all New Zealanders. The Society is non-partisan and is an advocate for Internet and related telecommunications public and technical policy issues on behalf of the Internet Community in New Zealand - both users and the Industry as a whole.

1.4. Our comments in this submission reflect our policy principles (set out below).

Figure one: InternetNZ's policy principles



1.5. Of particular relevance to this Convergence process are the following principles:

- a) the Internet should be open and uncapturable
- b) Internet markets should be competitive
- c) that the Internet should be accessible by and inclusive of everyone.

1.6. We have undertaken consultation with our membership and held two workshops in Auckland and Wellington with the Telecommunications Users Association of New Zealand (TUANZ), designed to solicit participation and opinions from a wider set of stakeholders that may have otherwise been involved in this process.

- 1.7. We welcome the opportunity to discuss our submission with you. Please contact Andrew Cushen, Work Programme Director at andrew@internetnz.nz or on 021 346 408 for further information.



Jordan Carter
Chief Executive

2. Executive Summary

- 2.1. The telecommunications regulatory environment is critical, not just to the telecommunications sector but to the whole New Zealand economy. Government policy in relation to the regulatory environment for the sector cannot be viewed in isolation from wider government policy for the sector and the economy as a whole.
- 2.2. InternetNZ, and a great number of others, has said for some time that in order to truly address the potential and threats of convergence for both the economy and society that New Zealand needs to approach the breadth of legislative issues simultaneously – across broadcasting and telecommunications, and including the range of issues included in both this Discussion Document (DD) and in the rest of the Convergence Programme. We welcome this process – but we are also very mindful that to do so correctly, this process should be consultative, multi-stakeholder and comprehensive. It should not be rushed unduly, as rushing will produce sub-optimal outcomes and inevitably exclude voices that would otherwise participate.
- 2.3. Subsequent to the release of the discussion document the Minister made a media statement on 6 October putting forward inspirational targets for 2025. In that statement she said *“The targets send a critical signal to industry and consumers. They will provide guidance for industry investment, regulators, and the Government’s broader policy settings. They also recognise the importance the Government attaches to connectivity as an enabler of economic growth....”*
- 2.4. We are excited by these targets, and are aligned with the Government’s vision for telecommunications in New Zealand. Our single biggest message in this submission is about how essential it is to enhance competition as the driver of long term benefits to users of telecommunications, as we believe that this continued focus is necessary to see this vision and associated targets realised.
- 2.5. Inherent to any discussion of competition is a discussion about the regulations that encourage it. We consider that discussion of the regulatory environment, in isolation from the broader sector and economic vision, is unlikely to meet the requirements of the Minister’s statement. If the proposed targets (or any other targets) are to be met, the regulatory environment will need to play its part. With that in mind our submission has assumed a regulatory environment that will be consistent, in a dynamic environment, with the Minister’s targets.
- 2.6. Our understanding of those targets is that by 2025:
 - a) The inner/urban 80% of New Zealanders will have UFB fibre access.
 - b) The next predominantly rural 19% will have 50 Mbps peak service probably via mobile or fixed wireless¹.
 - c) The remaining 1% will have a 10 Mbps service probably via mobile or fixed wireless.
 - d) There will not be significant additional Government funding beyond the current UFB and RBI funding and the Telecommunications Development Levy. This is likely to significantly influence both the technology choice and the regulatory environment.
- 2.7. With the caveat that any target is set in a dynamic environment and will inevitably rise with advances in technology, we consider that the targets form a good basis on which to start the broader discussion that will then provide a more detailed picture of the future communications environment which a new regulatory framework will support.

¹ With lack of any guaranteed additional Government funding it is considered highly unlikely that fibre to the home (FTTH) will be viable in rural areas.

- 2.8. Given this iterative process for policy development we consider that it would be useful to continue discussions further. In particular, as one of the voices aligned with user interests, we would appreciate hearing from the Commerce Commission. We also believe in particular that it is essential that another round of consultation is completed before final policy decisions are made, and where possible we also believe a cross-submission process or workshops where complex issues can be teased out to be highly desirable.

3. Structure of this Submission

- 3.1. This submission is made in two parts.
- 3.2. The first part is an initial strategic overview focused primarily upon whether the proposals for the regulatory environment outlined in the discussion document will both serve the best long term interest of users and result in the deployment and ongoing maintenance and enhancement of the communications environment depicted by the Minister's targets.
- 3.3. The second part of the submission seeks to respond to the questions posed by the discussion document with the proviso that the answers cannot be taken in isolation from the broader strategic view.

Part One: Strategic Overview

4. Our vision for New Zealand telecommunications

- 4.1. Our vision for New Zealand telecommunications is embodied in the Principles that we have already noted above. In particular, this means that we stand for:
- a) High quality networks to allow New Zealanders to experience the very best of the Internet, and to contribute to developing the Internet here too.
 - b) Ensuring that all New Zealanders are able to access the Internet, and that we are committed to working on divides of all kinds that prevent people from doing so.
 - c) A competitive marketplace in telecommunications and Internet service provision, as such competition drives innovation and improvement and increases the utility of these networks to Internet users.
 - d) Helping New Zealand take advantage of the economic and social potential of the Internet and using it to innovate at home, at work and in our communities.

5. Our vision is aligned with the Government's

"The Government's long-term vision is for a vibrant communications environment that provides high quality and affordable services for all New Zealanders, and enables our economy to grow, innovate and compete in a dynamic global environment".

- 5.1. We are pleased to see that our vision strikes similar themes to that of the Government. We are also very mindful of how important these vision statements are in designing appropriate policy responses.
- 5.2. This statement is critical because it is the high level statement about government policy and policy decisions. Any downstream implementation will be tested against this statement. Such a broad statement needs to be supplemented with targets or objectives and with detail about how such broad policy is converted into legislation and then implemented through public investment, regulation and other interventions in order to deliver policy outcomes.
- 5.3. At its release the Discussion Document (DD) was lacking the detail of intended targets and sector policy objectives leaving a void. It largely commenced the discussion around the regulatory environment for 2020 without reference to the Government's policy objectives or how they were intended to be achieved. To some degree this void has been filled by the Minister issuing a statement and providing some aspirational targets for 2025. Much can be gleaned from these targets to inform us of the Government's policy objectives and importantly what role the regulatory environment will need to play in ensuring those objectives will be met.
- 5.4. We hope that the development of policy and the regulatory review will to some degree be an iterative process with increasing levels of specificity being provided - this however will require ongoing consultation.
- 5.5. As an example, the vision statement is very broad and a number of terms will need more detailed explanation, in particular, "high quality services", "affordable services", and "for all New Zealanders". Does this mean for example that all New Zealanders - even those living in the remotest parts of the country - can expect the same quality and price of services as those living in major urban centres? Does "affordable" mean that government will provide mechanisms to subsidise some users or regulate below cost the price of some, say, essential services? Likewise, the terms enabling the economy to grow, innovate and compete are important because they flow through

into the purpose statement of the Act, the basis upon which the Commerce Commission makes its regulatory decisions.

- 5.6. On the face of it the vision can be seen as depicting the balance between the Government's social objectives (high quality affordable services for New Zealanders) and its economic growth objectives. Further explanation of how the Government defines these key words and whether it assigns any priority to one term over another as it turns vision into reality will be critical.

6. Competition is proven to be powerful driver

- 6.1. We refer to our previous submission to the Ministry, dated 2nd February 2015. Our focus in this submission was to demonstrate to the Government that we believe that the current Telecommunications Act regime has been relatively successful in promoting competition to the long term benefit of end users. In the last 10 years, we have seen dramatic changes in the New Zealand telecommunications industry. Succinctly put:
- a) Significant decrease in retail prices for telecommunications
 - b) Continued investment from all major operators, keeping New Zealand as a high performer in terms of telecommunications infrastructure
 - c) Decreasing market intensity, indicating more competition
 - d) Static, if slightly decreased, industry profitability.
- 6.2. We believe that the driver of these benefits has been competition, and enhancing competitive intensity, and using this competitive tension to deliver to the long term benefit of end users.

7. Government's objective in this review should be to continue to increase competitive intensity

- 7.1. We consider that there remain means by which competition can continue to be promoted and legislation should be flexible enough to allow the Commerce Commission or market entrants to consider these.
- 7.2. For example, there can be: the unbundling of fibre services (e.g. wavelength unbundling) which has already been committed to by the LFCs and Chorus and that is reflected in the Act; unbundling of layer zero (ducts, poles, etc.); the separation of copper and fibre service providers; and the sharing of scarce infrastructure such as spectrum and cellular towers.
- 7.3. We consider that promoting actual competition is preferable to accepting that competition does not exist. Where it is clear that competition does not, and is unlikely to, exist utility type regulation may be appropriate. That needs to be a decision made by the Commerce Commission on a case by case basis. Therefore, the structure of the Act, and of the purpose statement, should facilitate that decision making by the Commission. Where the Commerce Commission is required to emulate the price of a competitive service, it should be free to choose the basis upon which it does that as long as it shows that this is in the best long term interest of end users. It is competition that best fosters innovation and investment. As noted by Margrethe Vestager, Commissioner with the European Commission:

"In competitive markets, companies have strong incentives to invest and innovate to offer superior products and win business from their competitors. Why should a company invest and innovate if there is no competitor to provide the impetus? I can still remember the days of national telecom monopolies in the EU: high prices, low service quality and less innovative products."

- 7.4. And the Chair of ACCC observed this month in his paper, *Promoting innovation through competition*:

“To become more productive and innovative there must be incentives to do so; and competition is the key driver of this”

- 7.5. The DD goes to some length to say that the review is part of a wider converged communications market yet segments of that converging market are currently regulated differently. We are supportive of the Government's moves to make the regulatory environment across the communications sector more consistent, recognising however that there are some differences between broadcasting, radiocommunications and telecommunications that will need to be specifically accommodated for.
- 7.6. However, we do not yet believe that therefore the regulatory environment across these three sectors needs to be considered in a single Communications Act – though suffice to say we remain open to being convinced. There is far more of this policy process to play out before the means through which these principles are enshrined into a single Act. We believe that it is best to continue to discuss and consult on the best approach in these areas, through a multi-stage discussion process, before concerning whether or how these could be merged.

8. The purpose statement needs to demonstrate this vision and continue to promote competition

- 8.1. The purpose statement of the Act is the basis upon which the Commerce Commission, and the Minister in some circumstances, makes decisions. Currently the purpose in the purpose statement is to promote competition in telecommunications markets for the long-term benefit of end-users (LTBEU). Dynamic efficiencies and incentives to invest and innovate are expressly part of that competition and LTBEU assessment. Competition is how the market ensures that desirable objectives such as growth, innovation, investment and efficiency are best met. To a large extent the market through competitive forces drives those objectives. By making regulatory decisions that promote competition the Commission should generally be left to determine the balance of those other objectives that will best serve end users.
- 8.2. Commission processes are defined in the Act to ensure that the Commission cannot just assert what is in end users' best interests. They have to follow the processes as laid down by the Act. It is clear that a number of these regulatory processes are in need of streamlining or refining to improve them - that is not a particularly easy task. The processes are there to provide safeguards and predictability however they can also provide avenues for delay or gaming. Care needs to be taken that changes to regulatory processes result in *better* outcomes not just *speedier* outcomes. In general terms we consider that the Commerce Commission is best placed to choose (after consultation) from a menu of processes it can follow to suit the particular case, rather than be bound by a single rigid process, due to the Act being overly prescriptive. That suggested approach via the Commission is usually the position under overlapping regimes in other OECD countries. We are an outlier in the way that detail is prescribed in our Telecommunications Act.
- 8.3. The DD proposes changing the purpose statement, in large part because it argues that with the separation of Telecom key parts of the telecommunications environment, notably the UFB and the copper wholesale markets, are unlikely to be sufficiently competitive and it is proposing alternative wording for the purpose statement namely:

'...to promote competition, or outcomes consistent with outcomes in competitive markets, for the long-term benefit of end-users..'

and

'...to promote growth, innovation and investment in communications markets for the long-term benefit of end-users.'

- 8.4. While the rationale for changing the purpose statement is understood there needs to be very careful consideration of the best approach and the way this is worded. As a general principle we would prefer for government to focus on the policy it is attempting to achieve and the framework of the regulatory processes it wishes to be followed, leaving the detail of the regulation such as pricing principles, pricing methodology, service descriptions, etc., to the independent experts at the Commerce Commission.
- 8.5. Currently the purpose statement is at the centre of long lasting legal arguments surrounding the Commission's pricing determinations, including the s18(2A) change to the statement introduced in the 2011 amendment Act. That alone should be a sufficient signal that especial care needs to be taken when amending the purpose statement if future litigation is to be avoided.
- 8.6. Promoting competition in the interests of LTBEU should be the primary objective. The Commission should only turn to promoting outcomes consistent with competition where there is, in the words of s 52G in Part 4 Commerce Act "Both ...little or no competition... and' little or no likelihood of a substantial increase in competition". As we submit below, all regulation of telecommunications services should be under the Telecommunications Act instead of having copper and UFB in Part 4. On that basis, there should be a single purpose statement for all telecommunications services, focussed on (a) always, and primarily, promoting the LTBEU and (b) either by competition or, if there is little or no completion by outcomes consistent with outcomes in competitive markets.
- 8.7. One of the reasons why the approach to using either or both the competition and the competition-mimicking limbs should be left to the regulator to decide, on the specific facts of each case, is that the answer is not simple and linear, even on scenarios we currently know about, let alone scenarios we can't yet predict. Take fibre local access, the service that is the least likely to have current or potential competitive restraints. Copper will be around in the UFB footprint for some time beyond 2020 and that alone is major competition until it is decommissioned area by area. But mobile and FWA can also compete for lower bandwidth users. Additionally, Layer 0 competition is possible over ducts and poles etc, bringing with it the benefits of shared infrastructure. Layer 1 fibre competition has been agreed to by Chorus and the LFCs in any event, and that is enshrined in the Act already. It is far better to encourage such competition (on the basis that the copper network must go at some point but there can be other competition too) than to discourage it. Such competition is highly efficient and not the converse.

9. A regulated fibre price on 1 January 2020 is essential

- 9.1. There are several timing issues discussed however the issue of whether fibre price regulation should be introduced ex-ante so that it will be in place on 1 January 2020 is likely to be critical.
- 9.2. The introduction of regulated fibre prices (and copper if copper is to be repriced using BBM) on 1 January 2020 will provide the level of certainty that investors, RSPs and end-users desire. It is critical that the Government makes its policy decisions in this area and passes legislation in sufficient time to allow the Commission to do its

work. Even if the new Act is passed in say 2017, however, there is ample time for the Commission to determine fibre and copper BBM pricing, the more so as the Commission can build on the extensive Part 4 experience and decisions including as to the IMs.

- 9.3. As a backstop, in case the fibre pricing determination is not completed, the current contractual fibre price should be maintained until such time as the determination is completed.

Part Two: Answers to specific questions posed in the Discussion Document

10. Chapter 1: Goals for this Review

Q1. Do you have any comments on the Government's:

- a. long-term vision for communications markets; and
- b. regulatory principles?

- 10.1. Yes. The vision is critical; while the high level statement is good it needs to be supplemented by a much more specific policy statement to avoid downstream legislation, regulation and implementation from being inadequately formulated. We have provided commentary on this strategic issue in part one.
- 10.2. InternetNZ considers that the regulatory principles set out by Treasury and the Productivity Commission are generally valid. However we also consider that the telecommunications and communications market(s) in New Zealand is unique.
- 10.3. We consider that the principle of having an independent regulator needs to be extended inasmuch as the Commission should be empowered with the flexibility to choose which pricing methodologies, pricing principles, service descriptions, etc. are most appropriate at a given time. We also consider that the regulator should be given wider and flexible powers consistent with the sort of powers that leading telecommunications regulators such as Ofcom have. Also, where there is an absence of competition the Commission should be charged with determining the price and non-price terms that best, in the words of s 52A Commerce Act, promote "outcomes that are consistent with outcomes produced in competitive markets...". In assessing whether there is little or no competition, potential competition by overbuild, unbundling, or infrastructure sharing should not be precluded unless it is clearly demonstrated to be inefficient.

11. Chapter 3: Is the regulatory framework fit for purpose? Six key problem areas

Q2. What is your view on creating an overarching 'Communications Act' to consolidate economic regulation across the communications sector?

- 11.1. For some time InternetNZ has recommended that the convergence of the telecommunications, radio spectrum and broadcasting sectors be recognised in regulatory terms. That does not mean that all aspects of the communications or information sectors necessarily fit into a one-size fits all regulatory model today. But, it does suggest that convergence needs to be recognised and that the Commerce Commission is given wider responsibilities and greater flexibility to use multiple regulatory tools to achieve consistent outcomes across the communications sector(s).
- 11.2. We therefore agree that consideration should be given to having a single Communications Act, dealing with radiocommunications, telecommunications and broadcasting, at least as to economic regulation, as the DD suggests. However, we consider that this requires a great deal more discussion, analysis and further consultation before going down that path.

11.3. If after that process it is decided to merge the sectors into one Act:

- a) The structure should be harmonised across those sectors, save that there are still sector specific issues, despite the convergence of those three areas, that need to be handled in the Act.
- b) We consider also that the more technical legislation (i.e. beyond economic regulation) for the three areas should be merged into the single Act. This facilitates a converged approach, and recognises that technical issues such as spectrum interference increasingly are not in a silo, but are integrally related to economic regulation. While a converged approach should be taken, again the legislation should recognise and deal with technical differences, although the Act ideally should take a facilitative approach, by which the detail is resolved by the regulator. As we note below, a single regulator – the Communications Commissioner – should handle all matters, economic and technical.

Q3. Have we identified the main challenges facing communications regulation as we move beyond 2020?

- 11.4. Only in part. There are the issues in other parts of this submission. Additionally, as we have indicated already in Part One, to construct a rigid regulatory environment at a time of exponential technology change is fraught with difficulty and will create uncertainty. As we have also indicated, the nature of demand, supply and competition are also likely to change in that period creating far more uncertainty than regulation ever will. In such a volatile environment the best regulatory solutions will be, transparent, flexible, quick to adapt, targeted at bottlenecks and most importantly will promote competition in the best interest of consumers. Overly prescriptive regulation, while superficially giving the appearance of certainty, is likely in fact to lead to greater uncertainty, as the regulator is forced to deal with circumstances artificially as they evolve and change.
- 11.5. There is also the key issue of regulatory independence. The Productivity Commission has made a number of useful comments about the importance of preserving regulatory independence:²

Independence from those who make the laws prevents a regulator being used for partisan purposes, promotes public confidence in decisions of the regulator, and allows it to work constructively with the sector being regulated.

Particular challenges may apply in situations where the state's activities are being regulated. There is a particular need for regulators of significant coercive state powers to be independent, as in the case of the Independent Police Conduct Authority.

However, there may also be challenges in regulating public services provided directly by the government, or which are substantially funded by the government. Where government is a major participant in a market – such as in health or education – then the risks of regulatory capture may be heightened. In particular there is the potential for the tension between the government's fiscal objectives and its regulatory objectives to be resolved inappropriately where a regulator is insufficiently independent.

- 11.6. In addition, the Productivity Commission warns:

Independent regulation provides a credible long-term commitment to an impartial and stable regulatory environment. This outcome should not be lightly discounted.³

² Productivity Commission, Issues Paper, Regulatory institutions and practices, August 2013, page 26.

12. Chapter 4: Pricing for fixed line access services

Q4. Do you agree with our policy objectives for the price regulation of fixed line infrastructure?

12.1. Only to a certain extent - The objectives that the regulatory framework should be predictable is sensible however the "framework" of regulation being predictable is not the same as the regulation itself being predictable or rigid. The framework needs to be clearly set by the Government and Parliament and should not change significantly over time. It should provide network owners with clear incentives to innovate and invest and to be efficient. However, the regulator and the regulation itself need to be able to adjust. It is not clear how competitive the communications environment will be in 2020 and beyond. It would be far too easy to make inefficient investment and undertake foolhardy innovation if incorrectly incentivised by an inappropriate regulatory regime. In a competitive market such risks are taken by investors - in a monopoly market the investors are indemnified and it is the consumer that pays the price.

Q5. Is it feasible to move to technology neutral service descriptions? How would this work in practice?

12.2. The DD posits that competition is potentially possible for certain applications such as voice services. It questions whether service descriptions in the Act create problems by being technology specific. The vision and purpose statements depict high-quality, affordable services being available to all New Zealanders which goes to the heart of the TSO objectives. We would add that technology neutral service descriptions carried through to the TSO might facilitate both improved competition and the cutting of copper - if the view holds that copper will gradually cease to be a competitive constraint on the price of fibre, over the UFB footprint (the position is different outside that footprint. However copper will remain a competitive constraint on UFB well beyond 2020.

12.3. Technology neutral service descriptions are desirable and where possible the legislation and regulation need to be couched in technology neutral terms and also in dynamic terms. This would facilitate competition and innovation.

12.4. In regard to the example cited in the DD, InternetNZ submitted in the TSO review⁴ that a nation-wide basic level/essential TSO service could be defined in technology neutral "data" terms that could be provided via mobile, fibre, fixed wireless or copper technology at a fixed regulated price. Such a service would be available nationally and would be competitive across all technologies⁵. Suppliers would compete both in terms of what they would include within the basic price regulated service and what they would offer beyond the basic service at additional cost.

12.5. Such a basic service would require fibre providers to sell a service below the current minimum 30/10 service and possibly below cost. However, the biggest current deterrent to the up-take of fibre where it is available is the additional cost of the minimum broadband service compared to voice only/dial-up copper services provided under the TSO. As broadcast and other non-essential services increasingly move to broadband the opportunity will arise to migrate these basic level customers

³ Productivity Commission, Regulatory institutions and practices, June 2014, page 220.

⁴ <http://www.mbie.govt.nz/info-services/sectors-industries/technology-communications/communications/telecommunications-service-obligations/tso-review/submissions/?searchterm=TSO%20review>

⁵ Issues such as provider of last resort would be minimal and for small numbers involved if necessary could be competitively tendered.

to higher value plans. Just as mobile operators migrate entry level pre-pay customers to higher value plans.

- 12.6. For this basic service, in future, there may be sufficient competition between mobile and fibre to potentially allow copper services to be cut.
- 12.7. We consider that end-users, if given the option of replacing an existing copper service with an identical technically neutral fibre service at a price that was guaranteed under a regulation such as the TSO and accompanied with free installation would jump at the opportunity. Furthermore, the benefits to operators of being able to reticulate fibre to all, or many, premises in a neighbourhood at the same time would be significant.
- 12.8. Any discussion regarding cutting copper should only take place in the context of providing a guaranteed, regulated, technically neutral TSO.
- 12.9. See also answer to question 12 below.

Q6. Do you consider utility-style regulation may now be more appropriate for fixed line communications services? If so, what elements would be most effective?

- 12.10. We have a number of reservations and we do not consider that the BBM is a universal panacea. Nor do we consider that the communications sector is as one-dimensional or as easily regulated as other utilities. If there is a vision (say of the communications environment in 2025) and a strategy for achieving that vision then the regulatory environment should evolve from that strategy.
- 12.11. As we identify above, it is competition in the LTBEU that first and foremost drives efficient innovation and investment. It is only where there will be and should be no overbuild of networks, as that is inefficient, that a different approach to promoting the LTBEU should be taken. In those circumstances, LTBEU is promoted by promoting “outcomes that are consistent with outcomes produced in competitive markets”.⁶ That is the competition mimicking approach taken in Part 4 and should only be utilised where it is not efficient to have competition and competition is unlikely to occur.
- 12.12. One of the reasons why the approach to using either or both the competition and the competition-mimicking limbs should be left to the regulator to decide, on the specific facts of each case, is that the answer is not simple and linear, even on scenarios we currently know about, let alone scenarios we can't yet predict. Take fibre local access, the service that is the least likely to have current or potential competitive restraints. Copper will be around in the UFB footprint for some time beyond 2020 and that alone is major competition until it is decommissioned area by area. But mobile and FWA can also compete for lower bandwidth users. Additionally, Layer 0 competition is possible over ducts and poles etc, bringing with it the benefits of shared infrastructure. Layer 1 fibre competition has been agreed to by Chorus and the LFCs in any event, and that is enshrined in the Act already. It is far better to encourage such competition (on the basis that the copper network must go at some point but there can be other competition too) than to discourage it. Such competition is highly efficient and not the converse.
- 12.13. In either scenario – a competition option or the mimicking competition option - the cost methodology is the same. TSLRIC is no longer a suitable cost methodology for any service, whether copper, fibre, mobile termination etc. But in any event the amending legislation should not take the prescriptive approach of the past to defining the cost methodology. To enable the regulator to deal with circumstances as

⁶ S 52A in Part 4 Commerce Act

and when they arise - some of which cannot be predicted now_-the regulator and not the Act should define the particularly type of cost methodology.

- 12.14. Additionally the independence of the regulator, and allowing it to make decisions independently is important, as the Productivity Commission identified in the passages quoted in answer to Q3 above.
- 12.15. Having noted that, however, it is clear enough that the methodology is likely to be BBM as from 2020; indeed, that is the model that should apply now given TSLRIC is outmoded. We consider the Act can define BBM as the model but only on the basis that:
- a) The regulator can later choose to apply a different cost methodology; and
 - b) BBM is not further defined: in particular, a TSLRIC RAB is not used as that artificially inflates the BBM RAB considerably, based on a clearly different methodology.
- 12.16. New Zealand telecommunications legislation is an outlier in the way that it requires the regulator to use a particular cost methodology: other best practice OECD regulators leave it - correctly - to the regulator to decide the cost methodology including the detail of that model (but in a way that the regulator is constrained not to act capriciously).
- 12.17. We consider it is better to have the Part 4 type regulation in the Telecommunications Act. Similar concepts and language can be used. A key advantage is that telecommunications regulation can use the experience and decisions developed under Part 4 including as to the input methodologies.

Q7. Would maintaining the status quo for UFB services be effective post-2020?

- 12.18. We agree with the view expressed in the DD that Government should no longer contract for the UFB price from 2020.
- 12.19. UFB providers entered into contracts with Crown Fibre Holdings understanding that the regulatory environment would change in 2020. Certain requirements such as layer 1 unbundling are scheduled to commence in 2020 and it was anticipated that the Commerce Commission would have determined the regulated fibre price by then including as to Layer 1. It is unlikely that the status quo (no unbundling, market pricing) will be either acceptable or effective from 2020. As the discussion document points out there is the potential for LFCs and Chorus to monopoly price fibre services if no regulation is in place or if the Commerce Commission requires considerable time to respond via schedule 3 processes. We would prefer to see regulated prices determined (rather than specified) and ready to be put in place on 1 January 2020.
- 12.20. There is ample time for this to happen prior to 2020, even if the new Act ends up being say 2 years away from now. However, if there are delays meaning that fibre regulation cannot be in place by 1 January 2020 then it might be desirable to have a backstop available and in the absence of an alternative the existing contracted prices might be an option. The terms of that backstop (that is, use of contractual prices until final decision) should, wherever possible, avoid providing incentives for further delay.

Q8. If the Government was to specify the pricing methodology that would eventually apply to UFB services, what methodology would be preferable?

12.21. See response to Q 3, 4 and 6. BBM but (a) the Commission can later change the cost methodology and (b) the Act does not define the methodology beyond a brief statement that BBM applies: in particular, the Act does not specify the TSLRIC RAB as the opening BBM RAB.

Q9. What is your view on UFB access services being regulated immediately from 1 January 2020, compared to a backstop regime whose application would be triggered by a Commerce Commission recommendation?

12.22. We strongly support the option of UFB regulation and a price determination being available to be brought into force on 1 January 2020 rather than a backstop or transitional measures.

12.23. The importance of this approach is illustrated by this scenario in the DD (highlighting added):⁷

“Since structural separation, the level of fixed wholesale prices will be less important for competition, as all RSPs will face the same input prices. Given this level playing field, RSPs should be impacted less by the level of prices set by the Commission for Chorus’ wholesale copper services. Prices for unbundled services and bitstream services are both set by the Commission on the same basis, so there should be no likelihood of a price squeeze. Competition should mean that any increase or decrease in costs will eventually be passed through to end-users, rather than retained by RSPs. No RSP should be able to get an enduring advantage by trying to hang on to these cost savings.”

12.24. What this says is that, in a negotiation between RSPs (access seekers) and Chorus/LFCs (access providers), access seekers would be broadly indifferent to whether the UFB or copper price goes up or down, as the competing RSPs are equally affected. Therefore a negotiation between access seekers and access providers would trend to upward pricing as the RSPs are largely indifferent. Increased prices get passed on to consumers by way of wealth transfer, where the RSP simply passes increases through. The negotiations will not have regard to LTBEU (i.e. consumers) and the prospect of subsequent regulation following a telco request to the regulator would have only limited impact on the carriers’ decision making, particularly as to the relatively price-insensitive access seekers. Thus, pricing would largely not be determined in the LTBEU.

12.25. Consumers have no leverage and therefore, even if they engage in negotiations, that makes little if any difference.

12.26. Since 2006 the New Zealand regulatory model has moved to automatic price and non-price term setting by the Commission. In part due to the reasons above, we submit that the status quo should apply: that the pricing is set by a specified date so that it is ready to implement from 2020.

12.27. At present we cannot see a basis on which there can be negotiations with a backstop, as consumers would have to have genuine leverage to achieve this, and various other issues such as the standing of the consumer representatives would need to be ironed out. We would listen to proposals however.

Q10. If the Government were to legislate for the price regulation of UFB services from 1 January 2020, do you have any initial thoughts on the scope of such regulation? Should a different approach be taken in LFC areas?

⁷ At page 60

12.28. Our expectation is that all the current UFB services that have been contracted by CFH will become regulated on 1 January 2020. An issue that will need to be handled by the regulator is the fact that each of the LFC And Chorus networks will have different cost profiles on a unit cost basis (for example, Northpower with its pole based service may be less costly than Chorus or Enable with their greater orientation to ducts).

12.29. There may be issues relating to how Chorus copper prices are regulated - for example Chorus should not be allowed to compete with its copper services in LFC areas (i.e. pocket price) and must it maintain a single nation-wide regulated price.

12.30. As we have indicated above we also expect that there will be a regulated layer 1 unbundled service available by 1 January 2020. Additional regulation such as regulated access to layer 0 and wavelength unbundling should be able to be introduced following investigation by the Commerce Commission, although ideally the legislation will add Layer 0 infrastructure sharing of ducts, etc, as a service in Schedule 1.

Q11. If the Government were to introduce a backstop regime for UFB services, do you have any initial thoughts on:

a. tailoring the traditional Schedule 3 investigation into whether UFB services should be regulated?

b. the need for transitional measures that might apply prior to the possible price regulation of UFB services?

12.31. As we have indicated above, our preference is that the Commission undertake pricing determinations for UFB fibre services in anticipation that they will be required for introduction on 1 January 2020. If for some reason the Commission was unable to complete the determination process by 1 January 2020 the current CFH contract prices could be maintained. Care needs to be taken that there are no incentives provided to deliberately delay the determination process.

Q12. Is there a case for change to the regulated copper access services pricing methodology? If so, what pricing methodology should apply post-2020?

12.32. The DD proposes the options of retaining FPP based TSLRIC pricing from 2020 for copper, or using the TSLRIC RAB as the opening RAB for BBM copper.

12.33. There are 3 main concerns with this approach:

- a) It consigns rural users outside RBI and UFB to artificially high prices given the TSLRIC-based price would be higher than a BBM using the correct opening RAB (or alternatively, other consumers pay more via a TSO mechanism than is justified). Rural users are likely to rely on copper for some years beyond 2020 (possibly many years if, for example, copper can achieve the Minister's aspirational 50 Mb/s speeds in due course);
- b) For some time beyond 2020, copper will compete with fibre;
- c) TSLRIC is a hypothetical network construct so that, as is happening on the FPP, the modern equivalent, a fibre network is used to cost and price, whereas BBM uses the actual network (historic cost copper and not replacement cost fibre). Mixing TSLRIC and BBM is to mix two distinctly different models and that is not justified or appropriate.

12.34. We consider therefore that the copper price is important enough for LTBEU to be correctly calculated using BBM. The time and cost in doing so is far smaller than the benefit in the LTBEU. There is ample time to complete this before 2020 and the use of Part 4 learnings, decisions, IM's etc, plus many of the learnings from the FPP will add speed and predictability.

Q13. If a BBM pricing methodology were put in place for UFB services, how would that impact the choice of a copper pricing regime? Should consistency be an important consideration?

12.35. See answer to Q12. Consistency with BBM for UFB is a further reason why there should be a move away from TSLRIC: to do otherwise would be unprincipled.

Q14. If BBM were introduced for UFB and/or copper services, should this be done under Part 4 of the Commerce Act or through a similar model under the Telecommunications Act? What would be the costs and benefits of each option?

12.36. All regulated services should be covered by the Telecommunications Act - which may well be a Communications Act by that time. As we have indicated earlier we do not consider the telecommunications sector to be as one dimensional as other utilities and we consider that there may be difficulties in meeting the Commerce Act threshold for imposing regulation. We have also explained above how Part 4 type regulation can be meshed with and included in the Telecommunications Act.

12.37. We have indicated earlier that the Government being clear about its policy objectives will go a long way towards determining the most appropriate regulatory environment. It is almost certain that the Telecommunications Act will need to be significantly amended or a new Communications Act introduced. It seems pointless in these circumstances to rely upon another Act.

Q15. What is the right balance between providing predictability through legislated pricing requirements and ensuring the Commission has flexibility to respond to a changing environment? How might this be achieved?

12.38. We have discussed balance and predictability earlier in part one and in answering Q 3 to 6. Predictability and flexibility can both be achieved. Predictability requires careful specification of policy objectives and accurate drafting to avoid different interpretations misunderstanding and subsequent litigation. Flexibility requires the Commission to be empowered to make decisions in the best long-term interest of end-users, for example, deciding which pricing methodology is most appropriate in a given circumstance.

Q16. Please comment on the implementation issues we have identified for moving to BBM for UFB and/or copper access services, including identifying any other material issues that you think would need to be addressed.

12.39. See our responses to questions 14 and 15.

13. Chapter 5: Mobile competition and radio spectrum

Q17. Is the current regulatory framework for mobile services effective? Will it continue to support both coverage and competition objectives in the future?

Q18. If changes are needed to regulation of mobile services, what should we consider? For example, is it worth actively promoting infrastructure sharing?

13.1. As the discussion document identifies there is competition in the Mobile sector but it is limited and it is fragile. The significant improvements in the mobile sector since the entrance of a third operator, 2 Degrees, show that there was insufficient competition with only two operators. However, there is particularly strong evidence emerging from Australian, US, Canadian and European cases that reducing 4 MNOs to 3 MNOs is creates major market problems including tacit collusion issues as 3 MNOs are, for example, not incentivised to offer MVNOs on reasonable terms. A common feature of clearances is a strong undertaking required of the merging MNOs to provide robust MVNO access. This implies that, with 3 MNOs, we have market problems. This is likely to emerge mostly in the data area rather than as to voice traffic.

- 13.2. This implies that the regime should facilitate MVNO and/or infrastructure sharing beyond Mobile co-location and roaming (being specified services that have failed to deliver in part as price must be an integral component of effective regulation.
- 13.3. It appears from the DD and the Minister's targets that there is expectation that rural broadband at 50Mbps will be delivered predominantly by mobile or fixed wireless services. Without intervention it is likely that such services will either be priced particularly highly, cross subsidised by urban mobile users, or both. Thus, rural has particularly acute issues in this area.
- 13.4. The regulatory framework for mobile services as with the regulatory framework generally will depend to a large extent upon the Government's policy objectives and whether it has a different objectives in rural. InternetNZ considers that promoting competition in rural areas for the benefit of end users will need proactive requirements to share infrastructure - including spectrum and towers. How this is done, via regulation such as co-location and roaming, through spectrum allocation, projects such as the RBI or through undertakings needs to be the subject of consultation and discussion as part of a longer term strategy.

Q19. What are your views on the options for reform in spectrum allocation?

a. How could the overlap between spectrum assignment by government and consideration under the Commerce Act be managed?

b. Should there be any requirements on government to consult or establish objectives for spectrum assignments in legislation?

- 13.5. Spectrum reform is long overdue and the Radiocommunications Act has been subject already to consultation and review with little changing. In her forward to the Spectrum 5 Year Outlook the Minister called for an agreed long term strategy for spectrum use and allocation. InternetNZ and other submitters supported that call. Without such a strategy and in an environment where technology and uses of that technology are changing rapidly we continue to have spectrum allocated for up to 20 years. Much of that spectrum is purchased by the two major mobile operators and much of it is unused or underused, competition is inhibited and prices for users remain higher than they should. Neither government's social or economic objectives are being fully met. As with other areas of this DD there is need for a clear exposition of the Government's policy objectives and strong indications about how it hopes to achieve those objectives.
- 13.6. Of the options offered in the DD we consider the option that comes closest to what we would envisage is:
- a) Providing greater transparency and accountability with respect to government decision making in setting the objectives for a particular spectrum assignment. This could be achieved by:
- Setting overarching objectives for spectrum assignment in legislation or regulation.
 - From experience in the sector generally it is clear that the Commerce Act is inadequate for dealing with competition issues. Much of the reason for the introduction of the Telecommunications Act in 2001 was the inadequacy of the Commerce Act.
- 13.7. However an overriding issue on which to further develop the position, is as to whether it would be better in this converging world where spectrum is closely intertwined with access regulation, to have spectrum economic regulation with the Commission instead of the Crown.

13.8. At a time when the Government recognises the need to take a holistic approach to converging communications sectors or sub-sectors and is proposing to create a new Communications Act the opportunity should be taken to correct existing failures. Spectrum use and allocation should be part of a new Act directed at ensuring the long-term interest of end users.

Q20. Is an undertakings regime needed to set and enforce spectrum assignment terms and conditions? Where would this sit within the existing legislative framework?

13.9. We agree with the DD commentary that deeds and contracts are blunt instruments that do not allow a graduated response to address breaches. An undertaking regime as proposed, sitting within a broader Communications Act would be preferred. However, much will depend upon the quality of the undertakings specification, monitoring, enforcement and penalties associated with the undertakings. When spectrum is allocated for 20 years much can change both technologically and commercially from the time undertakings are agreed. Undertakings need to incentivise continual improvement in the use of spectrum.

Q21. Should the Ministry of Business, Innovation and Employment or an independent agency monitor and enforce assignment conditions?

13.10. As a general principle we consider that MBIE on behalf of the Government should set the policy and regulatory frameworks while the independent Commerce Commission undertakes monitoring and enforcement roles.

14. Chapter 6: The regulatory toolkit

Q22. Is there a need to update the current purpose statement in the Telecommunications Act for the communications access regime? What are your views on the suggested changes?

14.1. Yes, in the manner and on the basis outlined in answer to Q4 and as set out in Para 8.6.

14.2. In answer to Q4 we have suggested a purpose statement focusing on promotion of the LTBEU by:

- a) The primary position that competition is the primary driver in the LTBEU; and
- b) if it is clearly shown that there is little or no competition, and it is inefficient to encourage competition such as by overbuild, unbundling or infrastructure sharing, then the LTBEU is promoted instead by promoting outcomes that are consistent with outcomes produced in competitive markets.

Q23. Are there any other barriers to withdrawal or switch-off of copper services which are not addressed here? For example, are there any services based on the legacy copper network for which a replacement product is required, and is not available in New Zealand?

14.3. We have commented at length on the issue of the TSO service both in response to the review of the TSO and in response to question 5 above. We consider that the TSO is not a barrier to the switch off of copper however we do believe that a guaranteed, technology neutral, basic/essential service at an affordable price available nationwide would incentivise end-users to voluntarily switch over to fibre services. Furthermore if such a service was combined with free installation of fibre there would be significant benefit to operators undertaking multiple fibre connections in a location at the same time.

14.4. To the best of our knowledge there are no copper based services without a replacement product being available. However, this is not an area in which we are

experts and we agree that some consideration needs to be taken into account before copper services can be completely withdrawn from an area.

Q24. In your view, should Chorus have to meet any requirements to protect consumers prior to withdrawing copper services or switching off the copper network within the UFB footprint?

a. What requirements should be met?

b. How should these requirements be given legal effect?

- 14.5. As long as there is a basic/essential service available over fibre that is equivalent in technology neutral terms to the current TSO copper service then the major outstanding requirements are the price of the service to the end user and any additional costs the consumer may face for connecting the fibre service and getting it working.
- 14.6. That would likely require the basic/essential/TSO fibre service to be set at the current equivalent copper price (which may be below cost) and it may in some circumstances require the current free connection to be extended. How such costs are apportioned between Chorus, LFCs, Spark and other service providers would need to be determined. We consider however that with correct promotion the bulk of consumers would voluntarily take the opportunity without being forced in any way.
- 14.7. Beyond the essential/TSO type service we consider that those not moving to fibre voluntarily will fall into three groups. One - those copper broadband customers which are able to get a satisfactory service at a lower price than the functionally equivalent fibre service being offered. Two - those consumers which have a genuine reason to retain copper services (for example they require a service that can only be delivered over copper). Three - those customers do not understand, or do not believe, they are receiving an equivalent or better service at the same price.
- 14.8. The three groups will have to be dealt with differently if it is intended to withdraw copper services. We would prefer a graduated response where consumers are initially encouraged to switch, via incentives if necessary and ultimately (not before 2020) forced to switch but with similar incentives applying following a reasonable lead-in time.

Q25. Is there a need for a mandatory codes system for providers of telecommunications services in New Zealand? How would this work in practice?

- 14.9. Yes, and there is a mandatory code scheme in Schedule 2 of the Act. It is little used and the regime for mandatory codes, which should be valuable as a means of establishing process, technical and carrier/customer relationships issues should be improved to enable that to happen.

Q26. Do you think there are current net neutrality issues in New Zealand?

- 14.10. We have addressed this question in our own Paper, as referenced by the DD.

Q27. Do you think the regulatory regime is capable of addressing net neutrality issues if they arise in New Zealand? If not, what approach should we consider?

a. Are there elements of the rules and expectations introduced in the European Union and United States that would be useful to have in the New Zealand regime?

- 14.11. We consider that there is sufficient competition and telecommunication regulation to ensure that, if New Zealand started to have a Net Neutrality issue, it could be dealt with.

14.12. However, we think an important precursor to this is that the Commerce Commission has the data and the ability to recognise when Net Neutrality is being breached. Does the Commission have access to the sensors and data points to see Net Neutrality is being breached?

14.13. We are encouraged by the recent formation of a Net Neutrality working group within the Telecommunication Carriers Forum (the TCF). This process will hopefully produce a code of practice, or other self-regulatory tool, that will enable the Commerce Commission and MBIE to monitor Net Neutrality issues in New Zealand.

14.14. As we commented in response to question 25 on mandating certain codes it might be appropriate for any TCF Net Neutrality Code to be mandated or subject to undertakings if that became necessary.

Q28. What do you consider is acceptable traffic management and what is not acceptable? Please provide specific and realistic examples. For example, should telecommunications providers:

a. be able to block or deprioritise lawful content, applications, or services?

14.15. Discrimination where operators prevent the use of certain applications, or discriminate in price between similar applications would constitute a clear breach of Net Neutrality for us.

14.16. For example, in 4G mobile networks, it may be possible for mobile operators to discriminate between their own VOIP services and services such as Skype or RedPhone by dedicating a specific voice channel for their own service. This could become discriminatory if use of their service was mandatory, not transparent or if operators deliberately downgraded competing services on their networks.

14.17. It is one thing to offer customers a standard service and then a more expensive service for higher use customers (these sorts of business or high use connections exist in current market), it is another to favour a specific product or service.

14.18. We would also be very concerned if ISPs were to be blocking legal traffic. We are committed to an open and "uncapturable" internet. Traffic blocking and filtering, especially for commercial purposes are not something we would ever support or condone.

b. be able to enter into commercial agreements with content providers to prioritise certain traffic?

14.19. We acknowledge that some form of prioritisation as a part of everyday network management and when done right, can be competition enhancing rather than anti-competitive. For example, zero-rating could be considered a form of prioritisation, but is a competitive tool / offering as opposed to a network neutrality issue and, in practice, is little different from offering a customer more data for the same price.

14.20. The position we would begin from is that prioritisation of types of data (as opposed to specific apps) is permissible and not a breach of Net Neutrality (e.g. email doesn't have the same low-latency requirements as video-conferencing or remote surgery). However, prioritisation of specific providers content, outside of caching or CDNs, would be a breach of Net Neutrality.

c. be able to prioritise certain types of traffic when their network is congested (such as voice traffic or emergency services calls)?

14.21. Yes. Business responses to congestion are a reality of network operation during times when demand outstrips supply.

14.22. We are comfortable with an approach where there is a norm for congestion related prioritisation around a small number of agreed services or functions that need to be prioritised (e.g. 111 calls, VOIP).

Q29. Are there other net neutrality matters you consider should be considered in a regulatory context (for example, peering or certain content distribution practices)?

14.23. As a voice for New Zealand's Internet Community, and as stewards of .nz, we think that Network Neutrality is best articulated by the 'five alls'. ISPs should be permitting:

- a) All Origins
- b) All Destinations
- c) All Ports
- d) All Protocols
- e) All content

14.24. Any exceptions or prioritisation should be limited to agreed, publicly debated, services or situations such as prioritisation of emergency services communications and network security protections (e.g. blackholing or sinkholing a DDoS).

14.25. However, we do not see a need to 'do something' about net neutrality. The anti-competitive issues within Net Neutrality can be, and should be, dealt with by existing legal frameworks and institutions. Any further consideration of additional rules should wait until after the TCF working group on Net Neutrality has finalised its work.

Q30. Do you have any suggestions for encouraging deregulation as part of the regulatory process?

14.26. As with other areas of this submission, we believe that the best solution towards resolving issues relating to deregulation is flexibility. In this case operators which believe that there is sufficient competition to justify deregulation should be able to approach the Commission and request an investigation. The Commission should in any event review whether services should be de-regulated every 5 years.

14.27. That is the status quo and we submit that should continue.

Q31. Do you support the Commerce Commission having the flexibility to:

- a. implement price-only regulation?
- b. adopt either a one- or two-stage pricing process?

14.28. Price only regulation is unworkable. Firstly, the price being set is the price of a service set out in non-price terms including specifications, SLAs etc. Change the non-price terms and, except as to minor changes, the price changes. Thus price cannot work on its own. Second, by not having non-price terms determined, supply of the service is open to gaming by the access provider as what it must deliver is not specified. All services have multiple minimum requirements that can vary (eg the size of the backhaul capacity, the restore time for a fault and so on). The Boost experience shows how access providers might manage such issues.

14.29. To illustrate this, regulating non-price terms only does not work, as the failure of the mobile co-location determination shows. The same sorts of reasons apply. (This means that the specified service category in Sch 1 is unworkable and the services there should be transferred to the designated services category, where price is also determined).

14.30. In regard to a one or two stage pricing process, again, our preference is generally towards providing the Commission with the flexibility to choose the best way to implement and enforce regulation, although we doubt the Commission would revert to the two phase process..

14.31. It worked poorly in practice. The Fletcher Inquiry concept was that most pricing would be concluded based on a quick and inexpensive IPP, which would not go to FPP. In reality, the IPP process has become a lengthy affair, taking 2 years or so to do what was expected to take only a few months. Lack of benchmarks has made this more problematic as well. It would be far quicker overall to go straight to FPP pricing. The major source of delay on UBA and UCLL pricing hasn't been the FPP (in fact that has gone too fast for optimal outcomes): it has been the IPP.

Q32. Do you have any comments on the current arrangements for consumer representation?

14.32. Consumer welfare is at the centre of the current legislation and the proposed legislation. The consumer perspective may differ from access seekers' and access providers' perspectives and it is too difficult to ensure that the regulator will sufficiently address matters from a sufficient full and correct consumer perspective. A well informed and well-funded consumer advocate function will make the regime work better and this is a valuable use of funds via the TDL.

14.33. Future consideration needs to be given to the resources available to the Commission to meet similar expense in order to adequately represent consumer interests beyond the interests of RSPs. In a future scenario RSPs may be less inclined to provide expert and costly analysis for the benefit of end users and there will be a greater onus placed on the Commission to not only provide initial analysis but also undertake the defensive analysis currently provided by RSPs. It is inconceivable that consumer groups, even if they were funded, would be able to afford this function.

14.34. The Commission already consults regularly with self-funded groups such as InternetNZ and TUANZ. TUANZ is a user group. InternetNZ is interested in the entire Internet ecosystem, and often argues positions that are consistent with user interests. We do consider that it would be appropriate for industry, under the TDL, to help fund consumer organisations such as TUANZ and Consumer to provide independent advice from a consumer perspective.

Q33. In your view, is there justification for the Government to make it clear in legislation whether or not backdating will occur?

14.35. Backdating is rarely in the best interest of end users, whether the price goes up on backdating or goes down. It is not enough to say that the most efficient price is the most accurate price and that should apply on a backdated basis. The key problem is that there is spilt milk and it is not possible to efficiently retrospectively get back efficiently.

14.36. We consider that the only time backdating is justified (up or down), is when there has been a clear and uncontroversial error to be fixed, which was the case for the backdating of the UCFLS charge. -

Q34. In your view, is there still a need for a separate Telecommunications Commissioner (rather than using the general Commissioners)?

- 14.37. The basic principle for decisions about role and function is that form follows function. While the DD is proposing some changes to the functions the Commission performs those functions are in many respects similar to the existing functions and should not mean that a different structure is required. The sector specific approach of a Commissioner, who is also a Commerce Commissioner and working within the Commerce Commission should be retained. In that way, there is ready access to Commerce Commission expertise, a notable example being access to the Part 4 IM experience.
- 14.38. The sector specific commissioner would become the Communications Commissioner.
- 14.39. Questions regarding the Title and number of Commissioners and their technical expertise will always arise. Convergence within the communications sector would suggest that generalists might be more appropriate than telecommunications specialists. Conversely the increasingly complex nature of telecommunications and the litigious nature of parties might suggest that more telecommunications specialists are required.
- 14.40. In most respects it is perhaps more important to ensure that the Commission and Commissioners have sufficient resources to hire expertise as and when it is required than it is to expect Commissioners to be the fonts of all knowledge. There are a number of places in this submission where we have identified additional work for the Commission and Commissioners. We recognise that the current volume of work is significant and that additional work needs to be adequately funded. Whether additional Commissioners are required to share the burden should largely be an issue for the Commission not dictated by legislation.

Q35. Would the increased accountability created by a merits review process outweigh the risk of increased uncertainty and length added into regulatory processes?

- 14.41. The DD only briefly touches upon merits review, in contrast with the detailed analysis and consultation as to Part 4 Merits Review. We recommend that material be given close consideration, including as to the mechanics for ensuring merits review is kept within evidential limits and cannot be gamed.
- 14.42. We support merits review on all Telecommunications Act issues. The IM appeal judgment shows how valuable this process is, including because the judgment (by a judge and 2 distinguished economists) is a valuable resource on economic principles and their application. The appeal has had the effect of stopping future court action and creating certainty as the lack of appeal from the recent WACC uplift IM decision well demonstrates. Certainty and predictability has been fostered where that would not have happened without merits review.
- 14.43. It is particularly important that the regulator has the discipline imposed by knowing a decision might be appealed so it is more likely to get it right and not act capriciously. Appeals as to law are poor vehicles in that regard.

Q36. Do you have any suggestions for the most effective way to transition to a new regulatory framework, and to ensure any updated framework remains fit for purpose over time?

- 14.44. As a general observation, when legislation changes significantly and especially where those changes are as a result of changing government policy it is likely that there will be errors, for example: unclear policy statements; incorrect drafting, regulators or courts interpreting requirements differently to the original intention. There are also likely to be unanticipated responses by industry and end-users and claims that may be real or imagined. This is the 4th change to the Telecommunications Act in 15 years.

Much of the change comes back to the overly prescriptive nature of the legislation. There is an opportunity now to remedy this, by a more facilitative approach that enables the regulator to craft solutions to new issues as they emerge, rather than having its hands tied.

14.45. Some of the changes to the legislation have involved major developments such as operational and then structural separation. But, to illustrate that even that may not justify the required change, the BT operational separation – a highly complex change as it was here – was achieved without statutory intervention: Ofcom had enough powers to achieve this.

14.46. A scheduled "implementation review", after say three or four years, in these circumstances is worthwhile.

14.47. One critical component that will provide certainty to investors and consumers alike is the early resolution of the regulated price for UFB fibre services from 1 January 2020. The Government should direct the Commission to commence the pricing determination process as soon as possible in order that all parties are aware what the price of UFB fibre services will be on 1 January 2020.

Q37. Do you have any comments on the potential removal of the 'broadcasting exclusion' in the Telecommunications Act?

14.48. We have no issue with the removal of the "broadcasting exclusion". Within the broader convergence of the sector and its regulation this is likely to be covered by a single Communications Act.

Q38. Are you aware of any barriers to trans-Tasman trade in communications markets that the Government should address, or areas where closer harmonisation with Australia would be beneficial?

14.49. We are aware that consumers continue to complain about the high cost of mobile roaming between New Zealand and Australia. John Key and Julia Gillard announced in February 2013 that the two countries would regulate the service but this has not occurred.

Q39. Please outline any other modifications you propose should be made to the regulatory framework, explaining how these would align with section 157AA(a) of the Telecommunications Act.

14.50. We have no further comment at this time but would appreciate further opportunity to discuss these critical issues with other stakeholders. There are the issues raised in the rest of this submission.

14.51. We add also that the problem of the Pay TV channel being the only effective vehicle to deliver premium content, particularly live rugby tests, remains. Rural NZ will get not get speeds that will deliver HD live for around 10 years. The Rugby Union in light of that has no option but to use Sky as it must have national coverage of live tests. While this creates broader competition issues now and potentially more so in the future (see for example the CMA and Ofcom issues with BSkyB and its RSP where the Wholesale Must Offer remedy applies), it creates a major problem for UFB uptake.

14.52. Many viewers consider they have no choice but to acquire the Sky service in order to get the rugby. If Sky must, similarly to the UK, offer a wholesale live rugby test service to online providers, UFB uptake is likely to jump. As part of this converged review, this option is suggested for consideration.

ABOUT INTERNETNZ

A better world through a better Internet

InternetNZ is a voice, a helping hand and a guide to the Internet for all New Zealanders. It provides a voice for the Internet, to the government and the public; it gives a helping hand to the Internet community; and it provides a guide to those who seek knowledge, support or any other method of benefiting the Internet and its users.

InternetNZ's vision is for a better world through a better Internet. To achieve that, we promote the Internet's benefits and uses and protect its potential. We are founded on the principle of advancing an open and uncaptureable Internet.

The growing importance of the Internet in people's everyday lives means that over the last twelve months we have significantly reoriented our strategic direction. The Internet is everywhere. We are a voice for the Internet's users and its potential to make life better.

InternetNZ helps foster an Internet where New Zealanders can freely express themselves online - where they can feel secure in their use of the Internet. We foster an Internet where a start-up can use the web to develop a presence and customer base for a new product, and we foster an Internet where gamers can get online and battle it out.

We work to ensure this Internet is safe, accessible and open.

The work we do is as varied as what you can find on the Internet.

We enable partner organisations to work in line with our objects - for example, supporting Internet access for groups who may miss out. We provide community funding to promote research and the discovery of ways to improve the Internet. We inform people about the Internet and explain it, to ensure it is well understood by those making decisions that help shape it.

We provide technical knowledge that you may not find in many places, and every year we bring the Internet community together at NetHui to share wisdom, talk about ideas and have discussions on the state of the Internet.

InternetNZ is the designated manager for the .nz country code top-level domain and represents New Zealand at a global level through that role.

InternetNZ is a non-profit open membership incorporated society, overseen by a council elected by members. We have two wholly owned subsidiaries that ensure that .nz is run effectively and fairly - the Domain Name Commission (DNC) develops and enforces policies for the .nz domain name space, and .nz Registry Services (NZRS) maintains and publishes the register of .nz names and operates the Domain Name System for .nz

For more information visit: <https://internetnz.nz/about-us/internetnz-group>