

**ENABLE NETWORKS LIMITED**

**SUBMISSION ON THE DISCUSSION DOCUMENT: ENHANCING  
TELECOMMUNICATIONS REGULATORY AND FUNDING  
FRAMEWORKS**

**19 June 2024**

**PART 1- PUBLIC SUBMISSION**

## 1. Introduction

- 1.1 Thank you for the opportunity to provide submissions on the issues raised in the MBIE Discussion Document. We agree that it is important to regularly review regulatory settings in the telecommunications markets, which are continuing to evolve with new technologies, business models and competitive dynamics.
- 1.2 Enable's submission comprises four parts. Part 1 of this submission is not confidential (**Enable's Public Submission**). Information which is commercially sensitive and confidential to Enable is set out in Enable's Part 2 – Confidential Submission (**Enable's Confidential Submission**). Enable's response in relation to Section 6: Governance settings in other local fibre company constitutions has been provided separately to allow for cross submissions in Part 3, the public version (**Section 6 Public**) and Part 4, the confidential version (**Section 6 Confidential**).

## 2. Executive Summary

- 2.1 The area of particular importance to Enable lies in Section 6: Governance Settings in 'other' local fibre company constitutions. We not only strongly believe that it is appropriate, if not vital, to consider the changes to constitutional settings that govern the other LFCs as set out in the Discussion Document, but we also believe that the 'out of scope' matters should also be addressed. For this reason, we have set out our submission to this section separately and invite MBIE to allow cross-submissions in this consultation process. We believe that the constitutional settings are no longer relevant (as we have now completed the network build and repaid all of the Crown funding) and also that there are appropriate controls in place in our other regulatory documents (such as our Deed of Open Access Undertakings and Part 6 of the Telecommunications Act 2001). Finally, competition would be enhanced with wider options for consumers if the restrictions are removed.
- 2.2 The other area of importance to Enable is in Section 2: Accessing shared property for fibre installations. We fully support a reinstatement of the statutory rights for fibre installations on a permanent basis (along with the expansion for higher impact installations and allowing the rights to be invoked without a retail connection order set out in the Discussion Document). However, in the meantime, the most pressing issue is to ensure that there not be any gap or period where the rights are not in effect given the expiry date of 1 January 2025. We believe that this will cause significant practical implications for fibre providers and uncertainty for consumers ordering fibre. We request that there be a postponement to the expiry date while the review process in MBIE's Discussion Document is worked through.

## 3. Section 1: Consumer Access to dispute resolution

- 3.1 Enable believes that membership in an industry dispute resolution scheme should be mandatory. We believe that consumers that purchase services from a telecommunications service provider (**TSP**), that is not part of a dispute resolution scheme, are disadvantaged, especially where a dispute cannot be resolved between the parties themselves. The purpose of a dispute resolution scheme is to maintain public confidence in the sector by handling disputes fairly and with impartiality. If a telecommunications service provider is not a member of a dispute resolution scheme, a consumer dealing with that entity may lose the opportunity for his or her dispute to be resolved quickly and economically.
- 3.2 Further, if a decision is reached to maintain the status quo (with no mandatory dispute resolution scheme membership), we believe those TSPs that are not a member of an industry dispute resolution scheme should be transparent that this is the case so that a consumer can make an informed choice whether to proceed with that TSP at the outset, before a commercial relationship is entered into. It should not be the case that a consumer only discovers that the TSP is not a member of an industry dispute resolution scheme only after they have raised a dispute with that TSP.

- 3.3 However, we agree with the considerations that scheme membership fees need to be affordable so that the fees do not act as a barrier to smaller or new TSPs entering the market. We also believe that some consideration will also need to happen in relation to those TSPs that provide bundled telecommunication services, such as power and telecommunication services. There may be multiple dispute resolution schemes that apply to a consumer's complaint across both industries, and it will be important to provide clarity as to which (or whether it is in fact both) will apply in the circumstances.

#### 4. **Section 2: Accessing shared property for fibre installations**

##### *Issue 1: Expiry of statutory rights for fibre installations*

- 4.1 Enable strongly recommends that the statutory rights to access shared property for fibre installations set out under Subpart 3 of Part 4 of the Telecommunications Act 2001 (the **Statutory Rights**) not only be reinstated on a permanent basis but also that there not be a gap or period where the rights are not in effect. Enable has significant concerns should there be a period where the rights are not in effect for the following reasons.
- (a) This will cause significant practical implications for fibre providers (and their service partners). Enable utilises the Statutory Rights for a large proportion of its right of way builds currently. Details of our current use of the Statutory Rights in rights of way is set out in Enable's Confidential Submission. Accordingly, our systems and approach are very much targeted around use of the Statutory Rights. The impact of not using the Statutory Rights will be significant in terms of the disruption to the business with reverting back to pre-Statutory Rights practices.
  - (b) A period without the Statutory Rights will also cause uncertainty for consumers ordering fibre. The Statutory Rights contain certainty in terms of timeframes for consumers, whether this is the notice period before a fibre provider is able to carry out a Category 1 installation<sup>1</sup> or the timeframe for an affected parties to raise an objection for a Category 2 installation<sup>2</sup>. However, there is no such certainty where consent from all affected parties is required. In addition, the Statutory Rights provided limited grounds to raise an objection<sup>3</sup> and if sufficient evidence is not provided to support that ground of objection, the dispute is resolved in favour of the fibre provider.<sup>4</sup> There are no such constraints in a consent-based regime.
  - (c) The alternatives to the Statutory Rights involve obtaining consent from all property owners or relying on easements. In the case of private easements, this can be uncertain and resource-intensive for the fibre provider. For example, relying on a private easement often involves reviewing the terms of the easement to ensure that it extends to invitees of the private owner and that the implied rights under the Land Transfer Regulations 2002 have not been varied. Please see further details in Enable's Confidential Submission. In addition, it is not practicable or cost effective to obtain easements in gross in the fibre provider's favour over all shared property.
  - (d) For the reasons noted above, resorting to a pre-Statutory Rights practices is likely to result in an increase in complaints stemming from installation delays and cancellations.
  - (e) Enable believes the issue will be magnified after 1 January 2025 due to increased housing intensification, fibre providers continuing to extend their networks into more rural areas and where the availability of fibre is critical before Chorus is able to remove copper in a

<sup>1</sup> S155K of the Telecommunications Act 2001.

<sup>2</sup> s155N of the Telecommunications Act 2001.

<sup>3</sup> *ibid*

<sup>4</sup> See the case example at <https://www.udl.co.nz/en/support-and-information/case-examples/> relating to the Broadband Shared Property Access and Fibre Installation.

particular area. In other words, the reasons that the Statutory Rights were brought into being still very much exist.

- 4.2 For these reasons, we believe there should be a postponement to the expiration of the Statutory Rights while the review process set out in the MBIE's Discussion Document is worked through. This would need to be flexible enough to allow for the relevant decision-making processes and where applicable, the legislative vehicle to be put in place.
- 4.3 The Statutory Rights have ensured that Enable has connected many more properties than it would have had it needed to obtain consent (which was our process for existing properties or brownfields) prior to the Statutory Rights. We note that often the reason for withholding consent for a fibre installation is motivated by a neighbourly dispute or other reasons unrelated to the actual fibre installation. Please refer to Enable's Confidential Submission for more information.
- 4.4 Furthermore, we believe that the significant advantages that the Statutory Rights brings to both fibre providers and consumers seeking a fibre installation justifies an amendment to allow the Statutory Rights on a permanent basis. The primary objective behind the Statutory Rights was to "maximise the number of New Zealanders able to connect to fibre services efficiently in areas where it is being deployed, in order to help realise the long-term social and economic benefits of high-speed fibre broadband. The use of high-speed broadband applications has an estimated worth of \$32 billion to New Zealand over 20 years."<sup>5</sup> This objective is still very much relevant today and likely to continue to be so for the reasons listed in 4.1(e) above. In addition, we also reference the comments from end users made as part of MBIE's consultation process for the Statutory Rights where it was noted that end users did not believe the current system (being the pre-Statutory Rights system) resulted in a fair outcome.<sup>6</sup> To ensure that consumers seeking fibre connection receive a fair outcome and in order to realise the full benefits of the ultra-fast broadband roll-out, we believe the Statutory Rights should be reinstated on a permanent basis.
- 4.5 Finally, the protections that currently exist in the legislation ensure that the rights of affected persons are protected. As noted above, affected parties have the right to object on certain grounds to fibre installations falling within the current Category 2. In addition, the Statutory Rights can only be exercised by a fibre provider that is a member of the dispute resolution scheme.

*Issue 2: Invoking statutory rights for high impact installations*

- 4.6 Enable supports expanding the scope of the Statutory Rights to cover some higher impact installations (on the basis the Statutory Rights are extended, which, as noted above, we strongly support). This would allow more consumers to be connected in circumstances where currently the Statutory Rights cannot be used. In particular, this would benefit those where the shared property in question is a long accessway or lane, where the restrictions on the length of the reinstatement area under a Category 2 build mean that the Statutory Rights cannot be used. Please see Enable's Confidential Submission for more details.
- 4.7 In terms of the changes to the Telecommunications (Property Access) Regulations 2017 (the **Regulations**) to incorporate higher impact installations, we propose the following three changes to 2.3 of Schedule 3 of the Regulations:
  - (a) the requirement in 2.3.2 that 'the area of the hard surface impacted by the installation (the **reinstatement area**) must not exceed 4 square metres for each dwelling that the fibre optic media passes on the property' be removed. The reference to 4 square metres only adds confusion in these circumstances as trenching is only usually referred to in linear metres.

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<sup>5</sup> Paragraph 41 of MBIE's Regulatory Impact Statement- Land access for telecommunications to support the deployment of Ultra-Fast Broadband dated 3 March 2016.

<sup>6</sup> *ibid*, paragraph 157.

- (b) that the maximum length of reinstatement area set out in 2.3.2(a) be extended from 3 to 8 metres with a clarification that this can be used concurrently and not per property (which may involve an amendment to 2.3.3 of Schedule 3). For example, if there are 5 properties in a shared accessway, a fibre provider would be able to reinstate for 40 concurrent metres from the road reserve rather than 8 metres outside each respective property. If it is interpreted as the maximum length outside *each* property, this would result in a patchwork of reinstatement rather than a single line down one side.
- (c) That the maximum width of the reinstatement area set out in 2.3.2(b) be extended so that it covers the full width of the respective driveway to allow for a lateral crossing (and in all other cases, must not exceed 30% of the width of the driveway). Otherwise, the alternative is to trench down both sides of the driveway in many cases resulting in double the work and increased impact on the shared accessway.

4.8 We believe that the changes set out above will allow for more consumers to be connected to fibre broadband whilst ensuring there are no material impacts on the property (and in many cases, less impact on the shared property than is currently the case). The changes will also ensure that there is less confusion with understanding the Regulations and ensuring that they are more aligned with industry understanding.

*Issue 3: Invoking the statutory rights without a retail connection order from an internet service provider*

- 4.9 Enable supports an amendment to the Statutory Rights (if reinstated) to enable the rights to be invoked without a retail connection order for two key reasons.
- 4.10 The first reason is, as noted in the MBIE Discussion Document, in relation to those circumstances where a property developer or owner wishes to make their property 'fibre-ready'. In these circumstances the owner or developer would not wish to place an order with an internet service provider as they intend to sell or move from the property shortly but wish to make the property more attractive to a purchasing party. These circumstances are likely to become more frequent in the coming months and years due to increased housing density/intensification as new houses/developments are completed and as fibre providers expand their networks into more rural areas. In addition, in these circumstances, allowing a property to be 'fibre-ready' will allow more competition in the market as fibre providers will be able to compete on a more even playing field. There will not be a delay caused by requiring a fibre installation in shared property if that purchaser orders a fibre service upon moving in. The fibre service will be able to be activated in a similar timeframe as ordering a fixed wireless connection. Therefore, ensuring that a consumer can make a decision based on their needs and requirements rather than what can be put in place more quickly. We are also aware through our customer satisfaction surveys that consumers have a much better customer experience and feel more satisfied with the process where the property they are ordering services from is 'fibre ready'. Please see Enable's Confidential Submission for more details.
- 4.11 The second reason is that by removing the need for at least one party to have placed an order means that there is no risk of other affected parties applying pressure to that party to cancel their order. Enable has seen a number of examples where pressure is applied to both Enable and owners in a shared accessway to disclose who has placed the order(s). In a number of cases, the order is cancelled just as Enable is reaching the end of the Statutory Rights process. If Enable is able to use the Statutory Rights without an internet service provider order, many consumers will be able to benefit from a fibre connection without the pressure of upsetting or receiving pressure from other affected parties in the shared accessway, taking neighbourly relations out of the equation. Please see further details in Enable's Confidential Submission.
- 4.12 We cannot see any negative impacts on consumers in either of the two reasons mentioned above. Both allow greater choice for consumers.

## 5. **Section 3: Telecommunications levy settings**

### *Issue 1: Identifying liable persons*

- 5.1 Enable agrees that telecommunications levy settings need to be adjusted to ensure all satellite broadband providers providing services to New Zealanders are captured (and are flexible enough to respond to market changes, such as new market entrants). This ensures that there is a level playing field across the market for government imposed fees and levies and ensures that all those who benefit from providing services in New Zealand also contribute to the costs of regulating that market. Satellite broadband providers are operating at an advantage by avoiding these costs. This was highlighted at the Rural Connectivity Symposium as small Wireless Internet Service Providers (WISPs) are struggling to compete with satellite broadband providers, such as Starlink, who have a much higher revenue yet are not contributing to the costs of regulating the New Zealand telecommunications market.
- 5.2 In addition, we don't believe that operators will be disincentivised to enter the market given the \$10million minimum revenue requirement.

### *Issue 2: Regulatory process to set the total Telecommunications Development levy amount.*

- 5.3 While we understand that it would be typical for levies to be set in regulation rather than the Act, Enable is concerned to ensure that appropriate controls are put in place. For example, if the Government did put the levy making power in secondary legislation, there should be a maximum cap on any levy increase and limits on what the levy can be used for. We also agree that there should be controls in terms of consultation requirements with those subject to the levy and strict criteria to guide any increases.
- 5.4 It is also important to consider that increased levy costs are likely to be passed onto consumers (and therefore, increasing the costs of these products). There will need to be a balance met between the Government being able to fund services that would otherwise not be offered commercially (or are offered at an unaffordable price) and the impact to consumers overall if the cost of telecommunication products increases.

## 6. **Section 4: Identifying participants in the market**

- 6.1 Enable supports MBIE's option 2 for there to be mandatory registration requirements for telecommunication participants so that they identify themselves to the Commerce Commission for monitoring and enforcement purposes. We believe that this step will help to ensure that there is an even playing field amongst market participants. However, Enable is concerned to ensure that this does not result in additional costs to the industry as part of this registration process.

## 7. **Section 6: Governance Settings in 'other' local fibre company constitutions.**

- 7.1 See separate documents.

## 8. **Section 7: Other matters**

### *Issue 1: Considering non-regulated fibre networks in specified fibre areas*

- 8.1 It is relevant for a Specified Fibre Area (**SFA**) to be deemed as such where LFCs have the same obligations as other SFAs, which is, where an obligation for Open Access, non-discrimination and equivalence exists. Therefore, Enable considers that a regulatory 'bottom line' as suggested by the considerations in the MBIE Discussion Paper would be a minimum.
- 8.2 In addition, we believe that there are commercial implications involved for smaller fibre providers whereby internet service providers may not consider the costs of onboarding with them worthwhile for the subset of customers made available by that fibre provider (in some cases only a few

hundred). In addition, obligations around Open Access should also be tested, i.e. it should be ensured if an area is made an SFA that there are confirmed to be other choices available rather than simply the potential for there to be other choices available in the future.

*Clarifying the pathway between information disclosure and price-quality regulation for regulated fibre providers.*

See separate documents.

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