One NZ submission on MBIE discussion document: enhancing telecommunications regulatory and funding frameworks

21 June 2024

Introduction

1. We welcome the opportunity to comment on Ministry of Business, Innovation and Employment (**MBIE**) discussion document: enhancing telecommunications regulatory and funding frameworks. The Telecommunication Act 2001 (the Act) was last amended in 2018 and, with our industry rapidly changing and evolving, this is the right time to consider targeted amendments to improve effectiveness of the telecommunications regulatory environment. This submission sets out One NZ's views on the proposals and makes recommendations for additional issues to be addressed.
2. We can understand the desire not to undertake a wholesale review of the telecommunications regulatory framework. However, MBIE should use the opportunity to address issues that arise directly from and are directly connected with the proposed changes set out in the discussion document, including:
    a. Liability under existing Telecommunications Development Levy (TDL) and opportunities to simplify levy funding for non-economic telecommunications infrastructure.
    b. Applicability of Part 7 of the Act to any operator that is participating in matters relating to a retail service, irrespective of whether they are restricted from operating in retail markets.

Summary of One NZ views

3. The below table provides an overview of One NZ's position on each consulted issue.

No	Proposal	One NZ position
1.	Consumer access to dispute resolution	Support Option 2: Making membership in an industry dispute resolution scheme mandatory, for both retail service providers and wholesale service providers.
2.	Expiry of statutory rights for fibre installations	Extension of the statutory rights after they expire on 1 January 2025 should only be implemented if there is strong evidence showing consumer demand and unmet need that requires legislation to solve. Commercial considerations of fibre network operators are not a sufficient reason to implement this extension. Absent a strong evidence base for the change, One NZ supports Option 1: for the status quo to remain and the statutory rights to expire as currently set out in legislation.
3.	Invoking statutory rights for high impact installations	Support Option 1: Status quo – the rights (if reinstated) are not expanded to include high impact installs.
4.	Invoking the statutory rights without a retail connection order from an internet service provider	Support Option 1: Status quo – retain requirement for a retail service order before statutory rights can be invoked (if reinstated).
5.	Identifying liable persons	Support an expanded Option 2: Legislative change – amend liability provisions to capture all satellite providers, as well as any other provider of telecommunications and/or connectivity services who utilises networks and generates data growth.
6.	Regulatory process to set the total Telecommunications Development Levy amount	Support Option 2: Legislative change to provide for the Telecommunications Development Levy amount to be set in regulations, *provided that* further logical

		and targeted changes to how the levy is administered and collected are implemented. Absent the proposed additional changes, One NZ supports Option 1: Status quo - the Telecommunications Development Levy amount remains set under Schedule 3B of the Act.
7.	Identifying participants in the market	Support Option 2: Mandatory registration requirement for telecommunications market participants.
8.	Enhancing information flow to the Emergency Location Information System	Support Option 2: Regulating the provision of emergency location information to the Emergency Location Information System in the Act, *provided that* this is limited to location information already provided to the Emergency Location Information System and no expansion of scope or costs occurs.
9.	Governance of permitted business activities of LFCs	Not opposed to Option 2: Allow the other LFCs to operate in any market, with a restriction on supplying telecommunications services to end users, *provided* this is the minimum required to align LFCs with Chorus.
10.	Process for LFCs to seek agreement to operate at layer 3 or 4	Not opposed to Option 2: Shift the mechanism for other LFCs to seek consent to operate at layer 3 and 4 into the Act (to align with Chorus' process).
11.	Considering non-regulated fibre networks in specified fibre areas	Not opposed to Option 2: Fibre built by non-regulated fibre service providers to be considered, *provided* this extends to fibre services that are supplied directly to consumers only.

12.	Other minor changes and clarifications	Recommend that targeted changes to Part 7 of the Act are made to improve fairness and transparency of regulatory design.

Consumer access to dispute resolution

4. One NZ supports the proposal to make membership of an industry dispute resolution scheme mandatory for all telecommunications service providers. The Commerce Commission and the Telecommunications Dispute Resolution Scheme (TDR) have taken several steps in recent years to encourage participation in the scheme across industry. However, a significant number of providers remain outside of the dispute resolution scheme. While this is most prevalent among smaller operators, some large operators with a significant telecommunications customer base are also choosing not to become members (e.g. Contact). The telecommunications industry operates in an extremely competitive environment, with minimal barriers to market entry. The TDR has a tiered membership structure, with a minimal annual membership cost for small operators recognising that they generate fewer disputes as a result of having fewer customers. It is important that all consumers have equal protections across industry, regardless of the provider's size. If this obligation is legislated, there should be no exceptions for smaller operators. Mandatory membership of dispute resolution schemes is also a common practice in other jurisdictions, such as the UK.
5. Furthermore, the mandatory membership requirement should extend beyond just retail service providers (RSPs), with wholesalers in scope too. We acknowledge that the majority of issues that get escalated to a dispute resolution service are related to RSPs. However, there are some issues that RSPs have limited or no control over that can result in customer complaints and disputes. For example, customer complaints about faults and installations represented nearly 20% of all complaints made to the TDR, and were the third and fourth most

complained about issues respectively, between July – December 2023.[1] A portion of complaints in these categories will be wholly related to fibre network faults and installation issues, which are in most cases outside RSPs' control. Chorus and other Local Fibre Companies (LFCs) are currently members of the TDR and there is a specific process for the resolution of disputes relating to issues with their networks. If the mandatory membership requirement is legislated for RSPs, there is evidently justification for extending this to wholesalers too.

6. As noted in the discussion document, the TDR is currently the only telecommunications dispute resolution scheme established under Part 7 of the Act. The TDR is an effective scheme. Recent changes made to the governance and operational aspects of the TDR following the Commerce Commission's 2021 review of the scheme have increased TDR's independence from industry and made it more accessible for end users. Nevertheless, the Act should continue to allow for other industry resolution schemes to be set up by the industry, and mandatory membership obligation should not be specific to the TDR.
7. Lastly, there is a persistent narrative surrounding the telecommunications industry that complaint volumes are consistently high and growing. The discussion document states that the high levels of complaints 'has been a persistent problem for over a decade, with complaint volumes doubling in the preceding five years' to the Commerce Commission's 2021 review of the TDR.[2] One NZ acknowledges that there is still work to be done to lift service performance. However, dispute resolution schemes like the TDR are a helpful objective source of the reality. For example, in the period between July – December 2023, there were only 1,781 complaints made to the TDR *across* industry – this is an average of 0.45 complaints per 10,000 telecommunications connections. Of those, only 5.7% of complaints were upheld and 7.5% were partially upheld. As a proportion of total customers, these metrics compare favourably with other network industries within New Zealand and international benchmarks.

[1] Telecommunications Dispute Resolution Half Year Report, July – December 2023
[2] MBIE Discussion document: Enhancing telecommunications regulatory and funding frameworks, May 2024, para 26

Accessing shared property for fibre installations

Issue 1: Expiry of statutory rights for fibre installations

8. The statutory property access rights for fibre installations were introduced as part of the UFB build programme. Now that this programme is completed, we believe that there is no ongoing rationale for supporting a special access regime for fibre vs. other telecommunications access technology types.
9. The legislative right for access to shared property for new fibre installs is a significant derogation to property rights. While there was justification to put this in place when UFB build programme first got underway, it was always intended that these rights would expire upon this programme's completion. There is no case for extending these rights, particularly on an open-ended basis. If the Government wants to seek to reinstate the rights for access to shared property for new fibre installs after the rights expire in 2025, a strong and compelling evidence base should be required that demonstrates existence of a problem that requires legislation to solve, beyond commercial considerations of fibre network operators. In particular, evidence of end user unmet need and demand is required to demonstrate the need for this issue to be addressed in legislation.
10. Strong and compelling evidence of end user demand for continuation of statutory right of access to shared property for fibre installations is necessary to justify an intervention that provides fibre with an advantage that is distortionary. Fibre should compete on its attributes and merits without legislative preference. Property owners that value fibre will support installation, while those who do not will select other access types that better meet their needs, including those who value less disruptive installation and provisioning processes.

Issue 2: Invoking statutory rights for high impact installations

11. One NZ supports Option 1, for the status quo to remain and the rights to not be expanded to include high impact installs. We believe there is currently no justification for a legislative solution on this matter. As set out above, compelling evidence of a problem that requires legislative intervention should be required before extending statutory rights. Strong evidence is even more important in regards to high impact installations given the greater likely impact they could have on the property.

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

12. If the Government decides to extend property access rights beyond 1 January 2025 after gathering sufficient evidence demonstrating strong justification for doing so, the status quo should remain in respect to the requirement for a retail connection from an internet service provider to be placed before the statutory rights can be invoked. We see no justification to

grant fibre providers access rights to properties where end users residing at those properties do not expressly wish to connect to fibre services. Again, property owners that value fibre will support installation.

Telecommunications levy settings

Issue 1: Identifying liable persons

13. One NZ welcomes the discussion about telecommunications levy settings. This is a timely issue to be considering and we believe there is a need for a more holistic review of the levy regime.
14. Liability under the Telecommunications Development Levy (TDL) and Telecommunications Regulatory Levy (TRL) accrues to operators who build and provide networks: a liable person is a person who 'provides a telecommunications service in New Zealand by means of some component of the public telecommunications network [PTN] that is operated by the person (emphasis added).'[3] A PTN is a network used wholly or partly by the public for the purpose of telecommunications services. This excludes from the liable group operators who utilise networks to provide telecommunications services, and drive growth in data that requires ongoing network investment (including non-commercial investments), but don't have networks themselves.
15. We support MBIE's proposal for the levy liability settings to be adjusted to ensure all satellite broadband providers providing services to New Zealanders are captured. However, if the Government wishes to ensure that the TDL remains fit for purpose – and capable of providing a realistic funding source for the scale of non-commercial investment in networks (e.g. extending coverage in regional and rural New Zealand or funding resilience upgrades) that are assumed across a range of policy proposals, it is essential to expand the pool of operators that contribute to the TDL beyond what is proposed in the discussion document.

[3] MBIE Discussion document, para 62

16. This is consistent with the Government's expressed goals of ensuring that 'all those who are benefiting from operating within our telecommunications market are contributing to the costs or regulating that market …[and] that the costs of telecommunications services that would not be commercially viable, but are in the public good to deliver, are covered.'[4] Plainly, these goals are not met if levy funding continues to be drawn only from those parties that operate networks, while others who utilise and benefit from those networks capture significant revenues but make no contribution to public good investments.
17. While we agree that the pool of operators liable to contribute to the levy should be extended, we question the rationale for such a limited and partial extension to satellite service providers only. The reasons that support this very limited extension would equally support extending liability to any provider of telecommunications/connectivity services who utilises networks and generates data growth that requires significant and sustained investment in these networks.
18. Indeed, MBIE cites as a benefit that Option 2 would 'promote a level playing field, as the levies would apply to all service providers who meet the revenue threshold and are benefiting from providing services to New Zealanders.'[5] However, this benefit is simply not achieved while liability to pay the levy remains tied to the operation of a network versus the provision of a service. Beyond satellite service providers, there are a range of digital and communications service providers operating over the top of networks who directly drive investment requirements that will need levy funding.
19. We request that MBIE specifically address this option of a further expanded pool and give proper consideration to how it would assist in meeting the goals of enabling non-commercial investments in networks and services.

[4] MBIE Discussion document, para 66
[5] MBIE Discussion document, p. 20

Issue 2: Regulatory process to set the total Telecommunications Development Levy amount

20. One NZ supports Option 1, for the status quo to remain in regards to levy liability provisions. Retention of Option 1, and the requirement that the total levy amount must be set by legislation, is consistent with the tax-like features of the levy, including that:
    a. it is a compulsory contribution;
    b. sanctions exist for non-payment; and
    c. it is not a payment made to the Crown for a specific service or benefit.
21. The discussion document has not identified any compelling evidence of a problem that it is seeking to solve through the proposed change beyond administrative convenience. The current process rightly provides appropriate checks and balances before the industry levy could be increased. Our industry operates in an environment that requires continuous and substantial investment in networks to meet growing end user demand. Regulatory certainty and predictability are critical for supporting the investment, and this includes certainty as to the quantum of government charges that will be taken from industry in each year.
22. Nevertheless, we would be open to supporting a levy model that provides the flexibility that MBIE is seeking if there is willingness to open a broader discussion about the best future construct of the TDL.
23. The discussion document rightly notes that the 'current framework does not allow enough flexibility to address changes in telecommunications markets.[6] It also correctly states that levy calculation is complex and administratively burdensome.[7] It is therefore surprising that the discussion document does not propose wider changes to the TDL construct that would genuinely create the flexibility to meet future demands for non-economic investment. This represents a lost policy opportunity. Levy collection is currently a convoluted regulatory process. Simplifying how the levy is attributed and collected would also reduce administrative burden for both industry and the Commerce Commission, which is aligned with the Government's broader aims around cutting red tape.

[6] MBIE Discussion document, para 73
[7] MBIE Discussion document, para 77

24. We propose that the TDL is replaced with a levy structure that is applied to end users of all telecommunications/connectivity services (versus the network-based levy construct that exists today). For example, the Government could set a $tbc figure that operators would then on-charge to customers (either generally or on a targeted basis). The pool of collected funds could be used to support investment in infrastructure or provision of connectivity to excluded end users. This approach would both broaden the pool of operators that would collect and contribute to the levy, and introduce greater flexibility as to how the levy could be set. It's also consistent with the principle endorsed by both the Infrastructure Commission and the Minister of Infrastructure that those who gain benefit from non-commercial investment pay for it.[8] We believe that this is a relatively simple change that would align telecommunications industry with other sectors, including electricity and fuel. It would be unfortunate if the opportunity to implement more wholesale positive changes to telecommunications industry levy structure through this process is missed.

Identifying participants in the market

25. One NZ supports a mandatory registration requirement for telecommunications market participants. The obligation should be applied universally to anyone offering telecommunications/connectivity services in New Zealand. Given we expect this would be a straightforward obligation with low compliance costs, we believe there is no rationale for applying anything other than a universal approach. In other words, there should be no *de minimis* exception for small operators.
26. We also support considerations raised in the TCF submission on the discussion document relating to the need to ensure that the registration process isn't overly burdensome and does not result in additional costs to industry for setting up and maintaining the register. Existing resources currently allocated to the Commerce Commission for regulation of the telecommunications sector should be used for this purpose.

[8] Speech to the LGNZ Infrastructure Symposium | Beehive.govt.nz

Enhancing information flow to the Emergency Location Information System

27. One NZ supports the clarification that emergency location information already provided to the Emergency Location Information System (ECLI) is supplied on a compulsory basis, not as a matter of agreement.
28. Compulsion should be limited to:
    a. Existing information and data supplied;
    b. Existing use cases for ECLI; and
    c. Existing systems, processes, tools and integration used to support these use cases.
29. We do not support general compulsion that would require operators to:
    a. Expand the information and data supplied;
    b. Invest to enable new or expanded use cases for ECLI; and/or
    c. Retain any categories of data to support ECLI use cases.
30. For example, the discussion document notes that '[t]he future potential use of satellite-to-cell mobile calling services might also support the operation of the [ECLI] System. It is unclear at this stage what changes (if any) would need to be made to facilitate location information for these calls.'[9] Inclusion of satellite calling would extend beyond the existing use case for ECLI and require significant input from operators to enable practically. An extension like this should be a matter for discussion and agreement, and we would not support a general compulsion power that requires operators to enable a new use case on terms that may not be practical or feasible.
31. Subject to this, we support clarification that:
    a. Supply of information to ECLI to support existing use cases is required, and that operators cannot refuse to supply this information; and

[9] MBIE Discussion document, para 90

b. That information becomes the responsibility of the Government once supplied (i.e. operators do not control security and handling of information once passed into ECLI environment).

32. The discussion document notes that '[c]onsideration would also be given to including details such as reporting requirements, performance expectations, monitoring and enforcement for non-compliance.'[10] The case for these measures and their scope is unclear. We would not support any measures that go beyond those already committed to through contractual arrangements with MBIE.

Governance settings in 'other' local fibre company constitutions

Issue 1: Governance of permitted business activities

33. One NZ does not have a strong view on this issue, but would not be opposed to amending the 'other' local fibre company (LFCs) constitutions to the minimum extent that is necessary to put them into an equivalent position to Chorus. This is subject to no changes being made to critical provisions that underpin the separation of retail and wholesale markets, including any change that would allow LFCs to directly supply end users of telecommunications services.

Issue 2: Process to seek agreement to operate at layer 3 or 4

34. One NZ does not have a strong view on this issue, but would not be opposed to shifting the mechanism for other LFCs to seek consent to operate at layer 3 and 4 into the Act, bringing alignment with Chorus' process.

[10] MBIE Discussion document, para 93

Other matters

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

35. One NZ does not have a strong view on this matter. We understand that the proposal is relevant in respect to Chorus' ability to withdraw copper where fibre is available from a non-regulated provider to consumers. This issue is immaterial because at present there are no unregulated fibre operators providing fibre services to consumers. If the Government decides to make changes to how specified fibre areas can be defined, this should be limited to allowing the Commerce Commission to consider fibre services provided to consumers by non-regulated providers. We agree with the discussion document that expansion of the specified fibre area framework to consider other technologies should remain out of scope of this process.[11]

Issue 2: Other minor changes and clarifications

36. We note MBIE's suggestion that most issues consulted on in the discussion document will require amending legislation to progress, and its view that 'it would be prudent to...address other minor non-policy issues in the bill at the same time.'[12] The discussion document does not identify all 'minor issues' contemplated but we would likely support the issue described at paragraph 131 of the discussion document.
37. Moreover, we believe this process provides a clear opportunity to address some other more fundamental issues with the Act and do not understand reluctance in the discussion document to do so.
38. In addition to addressing the levy framework issues more effectively as set out above, a targeted review of Part 7 of the Act should also be added to scope. Specifically, Part 7 should be broadened to capture any telecommunications operator that engages in direct-to-consumer marketing and therefore directly participates in an activity that relates to and

[11] MBIE Discussion document, para 124
[12] MBIE Discussion document, para 129

influences consumers' understanding of retail services. For example, LFCs take the view that Part 7 does not currently apply to them in any scenario, despite the fact that these operators engage in extensive direct-to-consumer marketing activity (refer to the separate letters for detail, provided to MBIE in addition to this submission). The lack of regulatory level playing field governing how providers can communicate with and market services to consumers is skewing the market and distorting competition. There is an opportunity to fix this issue, which materially affects both competition and consumer experience, and sits uncomfortably with the principle of retail and wholesale separation that is fundamental to the statutory scheme. Each of these items alone would justify addressing the issue immediately, and if MBIE's goals are to deliver fair and transparent regulatory design,[13] then it should do so now.

39. We understand that entities not currently subject to Part 7 may object on the basis that its extension would impose an unjustified regulatory burden (albeit one that could be avoided entirely through non-participation in any retail market activity). To ensure proportionality if scope is broadened to include these entities as proposed above, we suggest amendment could be made to clarify the thresholds for applicability of Part 7. The following thresholds for the use of Part 7 powers could be introduced:
    a. Is there sufficient evidence of end user demand for intervention under Part 7?
    b. Would outcomes sought be delivered via competition (i.e. will the behaviour of entities subject to Part 7 be constrained or influenced by competition to an extent that intervention is not required)?
    c. Does benefit of intervention outweigh detriment?

40. Please contact the following regarding any aspect of this submission.

[13] MBIE Discussion document, para 22

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