Tuatahi First Fibre

Response to the MBIE Discussion Document: *Enhancing Telecommunications Regulatory and Funding Frameworks*

19 June 2024

Background

Tuatahi First Fibre (**Tuatahi**) is pleased to have the opportunity to provide this response to the document titled *Enhancing Telecommunications Regulatory and Funding Frameworks* and released by the Ministry of Business, Innovation and Employment (**MBIE**) on 7 May 2024 (the **Discussion Document**).

Tuatahi is a fibre telecommunications network operator and supplier of wholesale fibre access services. Formed in 2010 as part of the ultrafast broadband (**UFB**) initiative tender process run by the Crown, Tuatahi was the company created to deliver the UFB project using a specific public-private-partnership (**PPP**) model.

The total Government support of the UFB initiative was up to $1.5 billion NZD[1], which included new regulatory controls to ensure the UFB objectives were achieved efficiently and on time due to the sensitivity and Crown risk relating to the use of public funding for an infrastructure project. That funding was to be shared across Tuatahi, Enable Networks, Northpower Fibre and Chorus, with the latter receiving the largest share of that funding.

Tuatahi repaid its share of the Crown funding in September 2016, however the Government Share (and a number of related controls) remain in place in the Tuatahi Constitution, and which are either inconsistent with or have been superseded by the Telecommunications Act 2001 Act (**Act**) (specifically, Parts 4AA and 6).

One part of the new regulatory controls created by the UFB project was a Ministerial Review of the Act in relation to the UFB fibre network operators. That review occurred between 2015 and 2017 and was based on delivering clarity that change was needed to *"…ensure the framework was optimal for competition, investment and innovation, ensuring that –*

- *excessive profits arising from natural monopoly services are limited*
- *regulation is stable and predictable*
- *regulation is only applied to the extent necessary to address a lack of competition*
- *regulation can respond rapidly to a changing environment*
- *market participants are responsive to consumer demands for service quality"* [2]

The outcome of that review was a new regulatory regime for the fibre wholesalers introduced by the Telecommunications (New Regulatory Framework) Amendment Act in 2018. Under that fibre regime, Chorus was made subject to price-quality (PQ) and information disclosure (ID) regulation, and Tuatahi, Enable Networks and Northpower Fibre were subject to ID regulation, from 1 January 2022 (when the Crown regulatory forbearance period for UFB expired). The object of the regime was to regulate activities only to the extent necessary to address a lack of competition, with the Commission acknowledging that a fibre deregulation review process *"is a necessary and appropriate feature of the Part 6, which recognises the dynamic nature of telecommunications markets".*[3]

To ensure any regulatory framework is adaptable to the constant and fast changing telecommunications market, and competing broadband technologies, further amendments to the fibre regulatory framework are needed. Unfortunately, our experience to-date is that, despite the best intentions and efforts of the people involved, the current process fails to support our desire to provide private sector investment in telecommunications product and service delivery innovation, and

[1] Ministry of Economic Development *New Zealand Government Ultra Fast Broadband Initiative: Invitation to Participate in Partner Selection Process (October 2009)*, [at 1]
[2] https://disclosure.legislation.govt.nz/bill/government/2017/293
[3] Commerce Commission Fibre Input Methodologies Main Final Reasons Paper 13 October 2020 [2.182]

supporting the Crown's policy objectives of improving digital equity and inclusion gaps (both in terms of rural access, and financial hardship) and supporting critical lifeline infrastructure growth and resilience. We started a process ~2 years ago, by requesting Crown (represented by the Minister of Finance, as the *Government Shareholder* in our Constitution) consent to reset our Constitution to align with our regulatory obligations under the Act.

We achieved one change to our Constitution in April 2023, which allowed us to deploy, own and supply wholesale fibre services on a fibre network anywhere in New Zealand, which effectively levelled the playing-field with Chorus, who has always had the ability to deploy fibre anywhere in New Zealand, including any other local fibre company (**LFC**) UFB areas.

At the time that change was approved, the Minister for the Digital Economy and Communications confirmed that the other changes we requested would be subject to a stakeholder consultation later in 2023 – which is what we expected the Discussion Document to contain, in addition to a review and extension of the fibre land access rights. During that time period, there have been significant shifts in the competitive landscape of the New Zealand telecommunications market, including increased investment in 4G and 5G fixed wireless network capacity and uptake, and LOE satellite broadband – none of which show any sign of slowing down, and are instead projected to increase rapidly, especially in the next 12-24 months.

On that basis, we are somewhat disappointed to note that the scope of the Discussion Document is only seeking stakeholder views on only a small number of the changes we requested in June 2022, and which the Minister promised to consult on when the removal of the geographic restriction from our Constitution was approved in April 2023, including specifically the duplication of obligations in our Undertakings (defined in 6.4 below) and Constitution.

Executive Summary

In providing feedback to the discussion document, we have sought to replicate the structure of the discussion document and answer the questions posed as much as possible. Where we have deviated from the structure of the discussion document and questions posed, is sections 6 and 7 (Governance Settings in 'Other' Local Fibre Company Constitutions, and Other Matters), where we have provided additional information that would not fit within the scope of the original questions raised.

Where information provided is confidential in nature this has been provided in a Confidential Appendix, and referred to in the body of the document.

Discussion Document Approach

Tuatahi agree with the objectives and criteria to be used, as it is in line with the intent of the current framework. We do not see any issue with the intent of the current framework, rather the issues are in the regulatory regime created itself.

Evaluating regime as it stands today in light of market changes and technological evolution, against the original intent will be a valuable exercise and illustrate the deficiencies in the rigid regulatory framework.

Section 1: Consumer access to dispute resolution

Do you consider that the lack of a mandatory requirement for telecommunications service providers to belong to an industry dispute resolution scheme is a problem that needs to be addressed?

1.1 We agree with the problem definition outlined in the Discussion Document, particularly with the introduction of global service providers such as Starlink and Amazon to the New Zealand telecommunications market. As the options for customers increase to include off-shore based providers, we anticipate the ease of access to a consumer dispute resolution process in New Zealand will become more pressing issue.

1.2 As stated in the Discussion Document, in addition to the introduction of offshore based LEO satellite providers to the broadband market, there are bundled telecommunications products being offered by other sectors (e.g. electricity retailers). The dispute resolution scheme run by Utilities Disputes Limited (**UDL**) is responsible for handling electricity, gas and water consumer complaints, in addition to handling complaints about fibre installations using the shared property access regime under the Telecommunications (Property Access and Other Matters) Amendment Act 2017. It is likely that customers are already confused about where to access a dispute resolution service for their broadband service if their provider is directing them to the UDL scheme.

1.3 A shift to a mandatory requirement for all on-shore and off-shore based telecommunications service providers to belong to a single New Zealand dispute resolution scheme will better support customers by providing a clear pathway irrespective of who the service provider is. There are also potential benefits for the industry's reputation, as mandatory membership should provide greater customers with more confidence in the process and outcomes.

1.4 It is also important to ensure that the financial burden of being a member of an industry resolution scheme is not so high that it discourages new entrants to the market, or drives additional costs to customers.

As a wholesaler, who is a member of the Telecommunications Dispute Resolution (TDR) scheme, what is our experience?

1.5 While the volume of complaints we receive each year is very low, we have experienced several issues as a result of the current scope of the TDR scheme. There is a gap in dispute resolution coverage for complaints relating to the proactive installation of fibre (which is where we install fibre with a developer/builder when a new premises is being constructed, prior to the customer moving in and ordering a fibre service through their retail service provider (or **RSP**) –a process we refer to as "*Get Fibre Ready*").

1.6 Pro-active fibre installations offers customers a better, and quicker, fibre installation experience, because they can order a fibre service and all we need to do is activate the Layer 2 equipment (or ONT) that is already installed in that premises[4]. We believe the TDR needs to allow customers to use the scheme if they have a dispute about any fibre installation method (i.e. pro-active, or in response to a fibre order through a RSP).

[4] refer to Table 1 in paragraph 2.20 below

What are your views on the Options identified? Do you have a preference, if so, why? Are there any Options we have not identified?

1.7 Our preference is Option 2, making membership in an industry dispute resolution scheme mandatory. We see clear consumer benefits with this approach, but only if it takes a proportionate approach to funding TDR scheme membership, so that it is not a burdensome requirement for smaller providers or new market entrants.

1.8 Option 2 also reflects the essential nature of telecommunications services. In modern New Zealand, telecommunications are regarded as a critical infrastructure alongside the likes of electricity. The electricity and gas sector has a mandatory obligation contained within the Electricity Act 2010, for every distributer and retailer to be a member of the dispute resolution scheme[5]. We see alignment in rationale for this type of provision to be applied to telecommunications service providers, as critical infrastructure providers.

1.9 We note that under the Act there is provision for additional industry dispute resolution schemes to be developed. We see multiple schemes as unlikely to yield any consumer benefit and potentially confusing, and ultimately drive cost into the telecommunications market (and ultimately retail prices) if wholesale and retail scheme members have to invest in managing multiple complaints processes and scheme providers.

[5] Schedule 6, Part 1, s43EA(1) Electricity Industry Act 2010 (Gas) and Part 4, Subpart 1, s96(1) Electricity Industry Act 2010 (Electricity)

Section 2: Accessing shared property for fibre installations

Issue 1: Expiry of statutory rights for fibre installations

2.1 The policy questions being considered alongside the extension of the current shared property access regime under the Telecommunications (Property Access and Other Matters) Amendment Act 2017 (**LAR**) are important, but we are primarily concerned about the risk of the land access rights expiring at the end of the current calendar year, and the subsequent risk of not having any statutory framework in place for installing fibre or accessing our fibre already installed in shared property for an unknown period. This cannot be allowed to happen.

2.2 The absence of the LAR rights will create a material process delay, and uncertainty for RSPs and customers, if an order for a fibre installation requires us to access shared property. We would be required to revert to a manual consent process, where we notify all of the affected property owners and request their written consent. Our data from the last two years[6] shows that we receive 3 to 4 percent more order cancellations where manual consent is needed, which will have a material financial impact if LAR lapses for an unknown period. Order cancellations occur when we do not receive a response, or the consent, from an affected property owner. This is a poor outcome for the customer, and the RSP who invested in the sale of a fibre service. This is illustrated by Table 1 located in the confidential information attached to this response, showing the percentage of cancelled orders is significantly higher for situations where consent is needed:

2.3 Without LAR, our experience shows that we will incur reduced RSP, and customer, effort or interest in orders, and a material increase in RSP cancellations of in-flight orders, for new fibre connection to premises located on shared property. This is because our records show the average time it takes to connect a customer fibre is 91 days when LAR cannot be used to access a shared property; compared to 44[7] days when we can use LAR.

2.4 The economic impact of a lapse of just six months is estimated to be a loss of 100,000 NZD[8] for Tuatahi. This is not including the material change in process for RSPs and resulting retail price outcomes.

2.5 As a fibre wholesaler, our revenue is entirely reliant on RSPs ordering our wholesale fibre services. The 3 largest RSPs have the option to offer alternative broadband services to their customers using that RSP's fixed wireless or mobile network – and if the LAR process is no longer an option, even temporarily, the fibre sales proposition for RSPs will be less competitive, and potential customers views of the install process tainted.

2.6 We therefore encourage the Minister and MBIE to urgently prioritise a short-form amendment to the Act to ensure the statutory rights for fibre installations on shared property remain in force, in their current form, to allow time for a full review of the scope of that regime to be completed and a permanent solution is implemented. At a minimum, we expect that to take an additional 6-12 months.

[6] See Confidential table
[7] Note: This is the combined average of both Category 1 & Category 2 installation times
[8] Calculated estimate of Net Present Value (**NPV**) loss using the data informing confidential table 1.

What are your views on the Options identified? Do you have a preference, if so why? Are there any Options we have not identified?

2.7 We prefer Option 2. As a fibre network operator and wholesale service provider we see LAR as a way to provide customers with certainty around gaining access to fibre services in a situation that otherwise may not be possible. For example due to a non-responsive or unhelpful neighbour. It additionally reduces the time to connect, resulting in an improved customer experience. This supports the sales proposition for RSPs when marketing fibre services to their customers.

2.8 A permanent LAR framework is the only viable option in the current competitive broadband market to meet customer expectations around the time it takes to get access to ultra-fast broadband services. Fibre is competing with other broadband services like FWA and mobile, which offers a simple, quick, *plug and play* option; and LOE satellite services that offer a quick self-installation alternative. In addition, LAR is essential to support the Chorus copper withdrawal process, and without LAR there is a very real risk that a number of premises will be left with no fixed telecommunications service because the manual written consent process often fails.

2.9 There are a large number of premises located on shared property which are yet to connect to fibre, and with the continued volume of brownfields and infill developments that include the use of, and access to, shared property, LAR offers a viable, consistent, mechanism to support housing growth.

2.10 Customers who have not connected to fibre in our UFB areas are likely to be slow adopters, so low barriers to obtaining a fibre connection are important for these customers. Once a fibre connection is installed it is there for perpetuity, so future residents benefit from the connection options available at the property.

2.11 There are some scenarios not covered by the existing LAR framework that we believe must be considered in a review. For example:

- Allowing fibre network operators to use LAR to install fibre as part of the build process where new premises are being built on shared property. This is a process we use called *Get Fibre Ready*, which allows us to pre-build fibre into new premises during the construction phase (at no cost to the developer or premises owner / occupant) so that the new owner / occupant can order a fibre service and have it activated to start on the same day they move in.
- Resetting the statutory right to access our fibre network equipment located on public or private property for the purpose of maintaining, repairing or extending our fibre network (e.g. to connect additional premises). The current scope of the LAR framework is limited to specific dates and solely for fibre connections we deliver using the LAR process, which leaves a gap in those statutory protections, including where the original owner/occupant of a premises located on shared property gives consent to a fibre connection, then later vacates that premises, leaving us without current affected property owner consent and access rights. The rights we are seeking require a minor amendment to the Act, and will be consistent with the same rights afforded to electricity lines companies.[9]

[9] s23 Part 3 Electricity Act 1992

As a fibre provider who uses these rights, what are the implications of these Options on your business?

2.12 Our experience delivering fibre connections for more than 12 years means we can confidently expect to incur an adverse impact both on the time it takes to connect customers, as well as the access to a fibre connection where the land access rights are not available (refer to our commentary in paragraphs 2.2 and 2.3 above). The expiry of the LAR process will directly affect our ability to invest in expanding access to fibre to more remote and non-urban areas and service infill and greenfields subdivisions where new build premises are located on shared accessways. An example of a recent business case that would be affected by the loss of LAR is contained in the confidential appendix to this response.

If the statutory rights were reinstated, what do you think an appropriate expiry date is (if any)?

2.13 As noted in paragraph 2.9 above, a permanent LAR framework is necessary to give confidence in the ability to deploy and access fibre to meet growing customer demands, and offer them choice. It will also give certainty to RSPs to continue their investment in marketing broadband services, and support the smooth and efficient withdrawal of copper services. There are no short or long-term risks to property owners. LAR, and its dispute resolution scheme managed by UFL, offer a clear, no-cost, efficient process to respond to customer complaints. In the very small number of situations where LAR has resulted in damage to a person's property.[10] Using a limited term set of rights for LAR is not forward-thinking, and removes the ability to future-proofing the fibre networks for growth, and infrastructure resilience initiatives.

2.14 Should a perpetual LAR framework be undesirable, we suggest that the rights be perpetual in the first instance, subject to intermittent review by MBIE to determine whether they are still necessary. This will provide greater certainty than the current regulatory mechanism as there would be no risk of temporary lapse as the review is undertaken, as is the risk in the current consultation period.

Issue 2: Invoking statutory rights for high impact installations

What are your views on the Options identified? Do you have a preference, if so, why?

2.15 Tuatahi would prefer Option 2, with the land access regime expanded to include some high impact installations. Additionally, a guidance document clarifying the application of the allowed high-impact installation methods would be useful for the fibre installation industry. We would be happy to assist in the creation of this guidance.

2.16 We have experienced challenges with multi-dwelling units (**MDUs**) which amendments to land access rights could address. These are discussed below.

If the statutory rights were expanded to cover some high impact installs, what type of 'high impact' installs should be permitted? If you are a fibre provider, please provide examples of what changes to the rights would make a significant difference to enabling more fibre connections.

2.17 We support expanding the statutory rights to support delivering fibre into MDUs, especially as residential housing growth is progressing towards more vertical developments (like apartments), where multiple customers will be located on a single *property*. The nature of deploying fibre into large, MDU, sites requires provisioning works that fall into the *high impact* category. This requires larger cable, drilling lengths and depths and the use of fibre distribution terminals to connect feeder cables and distribution cables into and within the

[10] https://www.udl.co.nz/report2023/

MDU building. We would like to have the ability to minimise the visual impact of MDU fibre installations (including reducing the need to install visible cables to exterior walls).

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

What are your views on the Options we have identified? Do you have a preference, if so, why?

2.18 We prefer Option 2, because it will allow these rights (if reinstated) to be invoked without a retail connection order as we foresee this as a significant process improvement that would yield improved customer outcomes and experience for those it would impact.

2.19 We can show there is a real impact on customer experience when install is ordered directly rather than through a retail connection order. This is illustrated by customer satisfaction survey data (Net Promotor Score (NPS) data), collected for both standard retail orders and proactive "*fibre-ready*" installs.

2.20 Comparing the NPS data collected (for the year to date) for retail order connections and *"fibre-ready*" connections, we can see there is a consistently better customer experience observed when the "*fibre-ready*" process is used:

Confidential advice to Government

Confidential advice to Government

2.21 The feedback we get indicates that direct order installation provides a smoother, more efficient installation experience, due to the removal of a middleman in the process. There are inconsistent levels of support provided to the customer for facilitation of fibre installation from retail service providers, which results in inconsistent experiences as well. For example, Electric Kiwi does not offer this service to customers at all. The FAQ's on their website stating they only offer fibre plans where a fibre connection is already in place[11].

2.22 This indicates that as well as an improvement in customer experience, there should also be benefits for the RSPs if the land access rights were expanded in this manner. Removing some of the administrative burden of the sales process through a process improvement.

2.23 To be able to expand the "*fibre-ready*" direct order process to invoke the land access rights on shared property would bring property management benefits. Landlords who want to make upgrades to a property, installing fibre for future tenants would be able to proactively order installation while a property is vacant. This also benefits tenants, as they would not have to work with landlords to obtain a fibre installation without certainty that it will be installed.

[11] https://www.electrickiwi.co.nz/broadband/

Section 3: Telecommunications levy settings

Issue 1: Identifying liable persons

Do you agree that our levy liability settings need to be adjusted to ensure all satellite broadband providers providing services to New Zealanders are captured (where they meet the revenue threshold)?

3.1 Tuatahi agree that the levy liability settings need to be adjusted to ensure all satellite broadband providers, providing services in New Zealand are captured where appropriate. This is due to the purpose of the two telecommunications levies.

3.2 MBIE state that the Telecommunications Development Levy "*subsidises telecommunications capabilities in the public interest which are otherwise not expected to be available commercially, or which are unaffordable*"[12]. As this is a levy which serves to improve telecommunications services in New Zealand for the public good, all those participating and benefiting from the market should be liable.

3.3 The Telecommunications Regulatory Levy acts as a cost recovery mechanism, recovering the costs of administering the telecommunications regulatory regime. We believe the same logic applies to this levy, those benefiting from the market in New Zealand should contribute to the costs of regulating the market.

3.4 The apportionment of the levy costs should be fairly distributed across all market participants, and not dissuade new market entrants from entering the New Zealand telecommunications market. Most other levied industries in New Zealand do not have a revenue threshold to meet before being liable for the levy. For example, the Milk Solids levy placed on all farmers who supply milk to a dairy company is paid on a purely proportionate basis.

3.5 We see the $10 million NZD revenue threshold as mechanism enough to ensure potential new market entrants are not dissuaded, as they do not participate in the levy regime until scale is achieved.

Do you agree adjustments to our levy liability settings are required to ensure our levy regime is flexible enough to respond to market changes (such as new market entrants)? If so, what changes do you consider would be appropriate in this regard?

3.6 Yes. The telecommunications landscape is rapidly evolving, so the levy liability settings must be flexible enough to adapt to these changing technologies and market participants.

Do you support MBIE's preferred Option (Option 2)? Why or why not? Are there any Options we have not identified?

3.7 We support Option 2 as all market participants should contribute to the levy scheme as discussed in paragraphs 3.2 and 3.3 above.

What advantages and disadvantages do you consider could arise from introducing flexibility into the way telecommunications operators might become liable for the levy, for example the ability to be made liable through regulation?

3.8 There is certainly benefit in ensuring that there is sufficient flexibility in place to capture all appropriate telecommunications operators, as it ensures a level playing field across service providers, promoting regulatory equity.

[12] https://www.mbie.govt.nz/science-and-technology/it-communications-and-broadband/our-role-in-the-ict-sector/telecommunications-development-levy#:~:text=The%20Telecommunications%20Development%20Levy%20subsidises,commercially%2C%20or%20which%20are%20unaffordable.

3.9 The potential disadvantages that we can foresee is the potential for regulatory uncertainty. A lack of certainty is likely to impact business decisions. Therefore, the ability to be made liable through regulation should have some guardrails in place to ensure that it is not viewed as entirely at the discretion of the regulator. This will ensure that there is not a level of regulatory uncertainty that dissuades market participation.

3.10 We have noted the concern that levy costs are passed on to customers. We observe that generally industry initially shoulders responsibility for new levy costs, but that these trickle down to the customer eventually. However, we don't believe that this is a risk related to the identification of liable persons, or broadening of the scope of liable persons, but rather a risk associated with issue 2 and the setting of levy amounts.

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

How well do you consider the process for setting the amount of the Telecommunications Development Levy (in the Act) works? What are the implications of having the amount set in the Act, in terms of consultation, timing, and flexibility for changing needs?

3.11 From Tuatahi's perspective, the process of setting the TDL amount (in the Act) provides a high level of certainty regarding financial planning each financial year. Therefore any decisions pertaining to a change in the manner TDL is set should take into account the value of certainty for telecommunications companies.

3.12 In addition to the certainty provided by the current regulatory process to set the TDL, the TDL differs from many other industry levies in terms of its use and administration. Namely, the levy appears to be one of the few industry levies administered by a government entity and used to fund infrastructure and emergency services. For example, the gas levy is administered by the gas industry body, not a government entity and therefore, companies who are members to that industry body appear to have more influence over how and where levy proceeds are utilised.

3.13 Given the autonomy the government has in how it utilises the levy, the processes used to set the levy should be transparent. If a change in regulatory process to set the levy is progressed, then to ensure adequate transparency and consistency we believe that it is also necessary to review the regime in its entirety, including calculation of the levy. This is currently out of scope of the consultation, but if Option 2 is progressed this should be reviewed at the same time.

Do you agree with MBIE's preferred Option (Option 2)? Why or why not? Are there any Options we have not identified?

3.14 Tuatahi do not support a move to implement a regulatory process to set TDR amounts, as it is unclear what the benefits of doing so are outside of administrative challenges. We certainly sympathise with the impacts of administrative burden, but given the level of certainty the current mechanism provides the industry this doesn't seem like sufficient reason to amend the process.

3.15 Levy settings for industry are a significant matter, which make the checks and balances provided by the parliamentary process appropriate where it is not a simple cost recovery mechanism.

What measures would you consider necessary to accompany any new regulation making power under MBIE's preferred Option? For example, clarifying when relevant stakeholders should be consulted and what considerations should be taken into account.

3.16 Levy costs are typically initially shouldered by industry, which effectively means those levy costs will eventually trickle down to the customer as it is factored into running and supply costs. [13]The impact on both companies (discussed in paragraph 3.11) and consumers make the setting of industry levies an important process to get right. Should the mechanism be changed MBIE should ensure that changed align with current guidance on best practice[14].

3.17 Should this be put in place, a consultation process for setting the levy will be needed. In addition to a consultation process, guardrails around justifications for levy increases would provide companies more assurance that decisions around the levy setting are being appropriately scrutinised.

[13] MBIE advice on Gas Industry Levy https://www.mbie.govt.nz/dmsdocument/22680-gas-levy-of-industry-participants-regulations-2022-proactiverelease-pdf#:~:text=The%20costs%20imposed%20on%20end,the%20majority%20of%20the%20levy.
[14] Office of the Auditor General, "*Setting and administering fees and levies for cost recovery: Good practice guide*" 2021; https://oag.parliament.nz/2021/fees-and-levies/part3.htm

Section 4: Identifying participants in the market

Do you consider there is a need for a registration requirement for telecommunications providers operating in New Zealand (when entering the market, as well as updating contact and other business details over time)? Why or why not?

4.1 Telecommunications is essential infrastructure and a lifeline utility, so we do consider it appropriate to mandate the registration of all telecommunications providers operating and supplying services to customers in New Zealand.

4.2 This will provide the regulator with visibility of all market participants to enable ease of regulatory oversight for these essential services. The use of a registration database could help make the administration of the levy regime easier, pending what information is collected for that database.

What are your views on the Options we have identified? Do you have a preference, if so, why? Are there any Options we have not identified?

4.3 We prefer Option 2. We see value in having a central repository of information regarding all telecommunications providers, both for the regulators and customers. Core information about telecommunications service providers in New Zealand, what services they offer, and where they operate would be a useful compilation of information for customers wanting to understand what is available to them outside of a sales process.

4.4 Depending on the level of detail MBIE intends to capture, if there was a way to include the ongoing administration of the registration database in with other information gathering processes (eg: the TDR process) this would be desirable.

What would be the implications of a registration requirement for your business?

4.5 This would be an administrative task to be undertaken at whatever given interval is prescribed by the regulator. How onerous the task would be depends on the level of information that will be included in the registration, and how frequently it will be updated.

4.6 While we support the idea of a registration database, we suggest efficient use of the information that is collected. For example if the data can be used for TDR calculation (or vice versa), this would cut down on the impacts of another administrative activity.

Do you see any benefits or problems with information provided for registration being released/disclosed publicly? If so, what types of information should or should not be disclosed?

4.7 We believe that the release of some information publicly could be of benefit to customers. A collated source of core information about what service providers operate in New Zealand, what areas they operate in, and what services they provide could be useful for customers seeking a single source of information.

4.8 Outside of information such as the above that is intended to benefit customers, we suggest that any additional information released publicly aligns with what is already in the public domain. For example information available through the New Zealand Companies Office.

Section 5: Enhancing information flow to the Emergency Location Information System

Tuatahi does not have any feedback on this section in the Discussion Document.

Section 6: Governance settings in 'other' local fibre company constitutions

Background

6.1 There is an extensive history to the scope of the regulatory framework and controls we have operated under since 2010. The constitutional restrictions that form the subject of the Discussion Document were part of the regulatory framework introduced in 2010 for the UFB initiative, with the objective of providing fibre broadband to 75% of New Zealanders over a ten-year period ending on 31 December 2019.

6.2 The Crown provided concessionary funding to LFCs to build the new UFB fibre-to-the-premises (**FTTP**) telecommunications networks in their designated areas, and in return the Crown received a special class of shares in that LFC. Those shares would be returned as the funding was progressively repaid as fibre uptake increased. That Crown investment in UFB was managed through a new Crown-owned investment company[15] now called Crown Infrastructure Partners Limited (**CIP**). CIP's purpose was "*to implement the government's objectives in relation to the availability of, and access to, ultrafast broadband by co-investing with private sector participants to deploy telecommunications network infrastructure*".[16]

6.3 The UFB rollout was governed by a partly statutory and partly contractual regulatory framework for the build period. The changes made to the Act to support UFB included Part 4AA and a requirement for a Ministerial Review of the Act in relation to the UFB fibre network operators, with any changes to the Act intended to apply from 1 January 2020 after the Crown UFB contracts and 10-year regulatory forbearance period expired.

6.4 Part 4AA required Tuatahi to give certain undertakings in favour of the Crown and enforceable by the Commerce Commission to provide services on an Open Access basis (the **Undertakings**).[17] The Undertakings apply to all of the wholesale services supplied by Tuatahi on its UFB FTTP network, which must be supplied to access seekers (i.e. RSPs) on a non-discriminatory manner and, from 1 January 2020, included access to unbundled layer 1 services on an equivalence of inputs basis.

6.5 The UFB contracts with the Crown specific the network build, provisioning and maintenance requirements, and regulated price caps, which would expire on 31 December 2019 ahead of any new fibre regulatory regime resulting from the review of the Act taking over. The Ministerial Review of the Act was undertaken between 2015 and 2017. That outcome of the Ministerial Review of the Act resulted in a new Part 6 to regulate fibre fixed line access services (**FFLAS**), and was added to the Act by the Telecommunications Amendment (New Regulatory Framework) Act 2017.

Government Shareholder

6.6 The issue of shares to CIP resulted in the inclusion of specific terms in our Constitution to align with the UFB contracts, and included the issue of a single government share to be held by the Minister of Finance on behalf of the Crown (the **Government Share**) with the right of veto over changes to the regulatory provisions in our Constitution. The Government Share does not have any dividend or voting rights, or entitlement to any distribution of surplus value that might arise in the event of a sale or liquidation of Tuatahi. However, it continues to hold specific veto powers over any adjustments to the activities permitted in our Constitution.

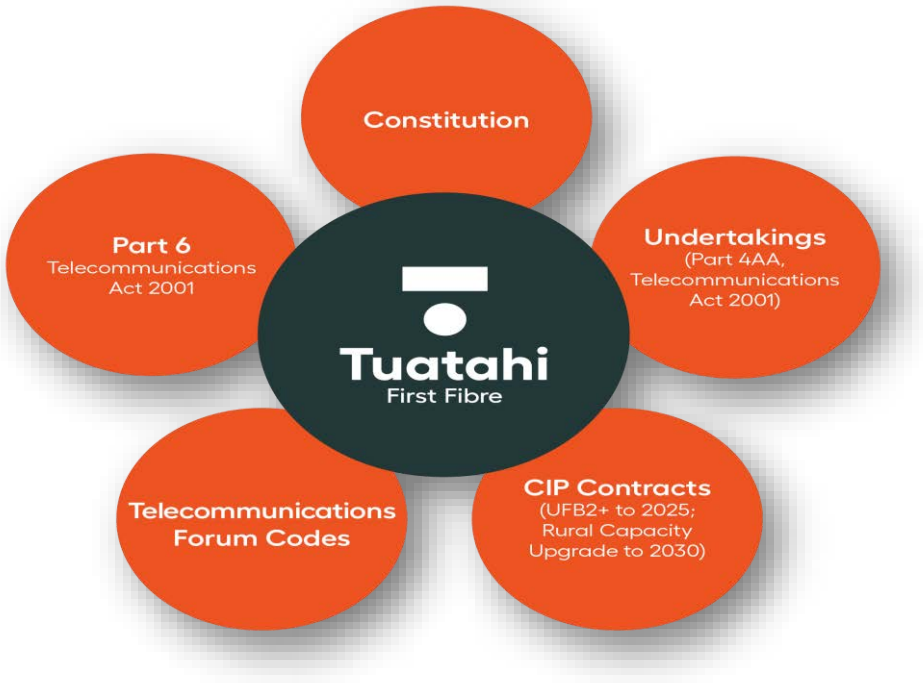
[15] ITP [1.3(b)]
[16] CIP constitution [6]
[17] https://tuatahi.cdn.prismic.io/tuatahi/4763f4f9-0fad-4a84-82cf-baa7e63db61d_Ultrafast-Fibre-undated-UPDATED.pdf; https://tuatahi.cdn.prismic.io/tuatahi/5dbbac82-af77-4bea-9e7d-d82d355464bb_Ultrafast-Fibre-24-May-2017-UPDATED.pdf

6.7 The new Part 6 FFLAS regulatory regime came into force on 1 January 2022 following a two-year extension granted by the Minister to allow the Commerce Commission to develop the regulations and input methodologies. This meant the UFB contracts (and price caps) were extended by a further two years. Across this same period, we also supported the Governments COVID-19 response, enabling work and schooling from home policies, by keeping our fibre network operating, and putting a hold on any wholesale fibre price increases during the COVID-19 lockdown period for effectively 2 years despite our cost pressures. The performance of our essential infrastructure over this crucial period, and supporting the Government response illustrates the value and performance of the fibre networks.

6.8 Although Part 6 came into force on 1 January 2022, the regulatory provisions in the Tuatahi Constitution did not expire to align with the commencement of the new regulations. The regulatory provisions fall into five categories:

- a prohibition on Tuatahi engaging in any business operation not specified in the Constitution (**Business Operations Restriction**);
- a geographic limit on where Tuatahi can deploy fibre and supply wholesale Layer 1 and Layer 2 fibre services (**Geographic Restriction**);
- a prohibition on Tuatahi supplying any telecommunications services above layer 2 without the prior approval of the Minister of Telecommunications (**Line of Business Restriction**);
- a prohibition on Tuatahi supplying retail services (whether using Tuatahi's UFB network or otherwise) and any other type/s of services to end-users (**Retail Restriction**); and
- a prohibition on Tuatahi being a vertically integrated telecommunications business (**VITB**) (or having a shareholder who is a VITB) without the consent of the Government Shareholder (**VITB Restriction**).

6.9 The Tuatahi Constitution is 1 of 5 regulatory instruments that control Tuatahi:



A lack of co-ordination between the various Government departments involved to create the UFB contracts, undertakings and our Constitution has resulted in overlap and conflict between the constitutional restrictions and the other regulatory control mechanisms. We sought to resolve this through a request to the Government Shareholder (represented by the Minister of Finance) in June 2022.

Process

6.10 On 15 June 2022 we delivered to the Minister of Finance (as the holder of our Government Share) a request (dated 10 June 2022) for the Minister's consent to remove the regulatory restrictions in our Constitution following the expiry of the UFB contracts and the implementation of Part 6. That request addressed controls around our objectives, permitted activities and the role of the Government Share.

6.11 What followed was a protracted process, involving a series of meetings, information requests and delays as Ministerial priorities overtook our request. MBIE officials have worked hard to engage with various Government stakeholders to provide information to support recommendations; there has been a lack of consistency and timeframe for evaluating requests. which we believe is obstructive to Tuatahi's wish to invest in (and even support Government) initiatives to improve access to telecommunications services. Offering services and support mechanisms to proposals and initiatives aimed at reducing the impact of economic and geographic factors that improve digital equity and inclusion, and support critical lifeline infrastructure network monitoring and community safety.

6.12 We are concerned that the significant public sector cuts[18] in progress will only exacerbate this problem and delays. We expect Government agencies will have no option but to limit their workload and outputs, which in effect will delay or deprioritise our consent process further.

6.13 While we were encouraged by the current Coalition Government's stated policy objective of reducing red tape, and statements by Prime Minister Luxon that the National Party "…*will rebuild the economy by cutting red tape which is strangling businesses and making it impossible to get things done*", and how "*Kiwi businesses thrive when we have a dynamic, competitive economy and it's the Government's job to get the settings right so that businesses can step up and achieve that*"[19]; we have yet to see any movement in that direction to improve and support the private sector investment in essential infrastructure like the fibre networks.

Regulatory simplification

6.14 We support and observe a real need for regulatory simplification based on the process we have experienced (outlined in paragraphs 6.11 to 6.12).The steps taking by the Coalition Government since the election are heading in the right direction. The Coalition Government's Action Plan for New Zealand[20], and 100-day plan,[21] include actions we are support, such as:

- establishing the new ministerial portfolio for regulation and the Ministry of Regulation on 1 March 2024 aimed at improving regulatory quality
- disestablishing the New Zealand Productivity Commission to provide a funding source for a new Ministry of Regulation
- Cabinet agreeing the new Ministry of Regulation will be one of 4 central agencies, alongside the Treasury, the Department of Prime Minister and Cabinet and Public Service Commission

[18] https://www.beehive.govt.nz/release/government-announces-budget-priorities
[19] https://www.national.org.nz/national_will_cut_red_tape_to_grow_the_economy
[20] https://www.beehive.govt.nz/sites/default/files/2024-04/Action%20Plan.pdf
[21] https://www.beehive.govt.nz/release/coalition-government-completes-100-day-plan

- announcing a reform into market studies introduced by the Commerce Amendment Act 2018 to focus on reducing regulatory barriers to drive competition

6.15 We hope to see the implementation of the Regulatory Standards Act to improve the quality of regulation to ensure regulatory decisions are based on principles of good law-making and economic efficiency sooner rather than later. It has become evident that New Zealand is lagging in its regulatory systems in comparison to our international counterparts. For example, the OECD has stressed the importance of sound regulatory stewardship in its most recent Regulatory Policy Outlook released in 2021.[22] That report noted:

> "*Sound regulatory policy has never been more important. The ability to provide clear, well-reasoned and evidence-based public policy will help to rebuild, refocus and reform economies for decades to come, as well as to enhance trust.*"
>
> "*The post-pandemic rebuilding of economies and society will require regulations that underpin the market economy ….. it will also require governments to enhance their capacity to cooperate on regulatory matters to face increasing transboundary challenges.*"
>
> "*The governance arrangements of regulatory institutions are critical to the delivery of their functions and their performance as well as to (re-) gaining trust of citizens and businesses."*

6.16 As an OECD member since 1973, New Zealand has pledged its dedication to achieving the OECD's aims. However, as confirmed in the *Indicators of Regulatory Policy and Governance (iREG) 2021 survey*,[23] New Zealand is lagging behind OECD best practice standards, particularly in relation to regulatory oversight, quality control, and methodology:

> "*New Zealand's transparency practices would benefit from a more systematic approach to notifying stakeholders of upcoming opportunities to contribute to regulatory proposals*."

6.17 Like so many sectors, we are weighed down by restrictive, ill-designed regulations which have stifled productivity and dynamism, while the competitive landscape for broadband shifts rapidly. The Government itself has said that the majority of New Zealand's economic stagnation can be attributed to poor productivity and "*poor productivity, in turn, can be traced to large amounts of time being spent on compliance activity, in comparison to productive activity*."[24] It goes without saying that investing in providing more communities with access to an affordable, stable and reliable internet connection is integral to economic growth and productivity - despite this, countless New Zealanders still face barriers to accessing a reliable internet connection due to a restrictive regulatory regime.

6.18 We support the Coalition Government's commitment to remove barriers to productivity and lift New Zealand's international reputation through improving the quality of our regulatory regimes. We are committed to investing in connecting more New Zealanders, and welcome Government policies that clear the path to make that happen. Within this frame of reference, we are open to working with the Government to support easing regulatory blockages to open up private sector investment, a desire signalled by Minister Bishop:

[22] https://gslegal.gov.gr/wp-content/uploads/2021/10/OECD-REGULATORY-POLICY-OUTLOOK-2021.pdf
[23] https://www.oecd-ilibrary.org/sites/ca08d797-en/index.html?itemId=/content/component/ca08d797-en
[24] https://assets.nationbuilder.com/actnz/pages/12989/attachments/original/1686019290/Policing_Red_Tape_and_Regulation.pdf?1686019290

> "*We're setting up a new National Infrastructure Agency. We're building up the resource and the expertise inside the Crown. We're modernising our framework. We're refining the PPP model to make sure it's world-class. So all that work's under way right now.*" [25]

For us, one of the most restrictive regulatory instruments in place is our Constitution, and we would welcome simplification here.

6.19 The Budget 2024 priority to "*develop a long-term, sustainable pipeline of infrastructure investments*" [26]. This will require an effective, focused approach from the Government to ensure no more time is wasted on bureaucratic processes, and close collaboration between us and the Government to address long-standing issues contributing to overcompliance and missed opportunities.

6.20 We welcome the opportunity to work closely with the Government to reform our regulatory framework for a more prosperous economy. A very simple step in this regard would be for the Minister of Finance to agree to the removal of the regulatory provisions in our Constitution.

Change to reflect market competition

6.21 We did manage to achieve one change to our Constitution in April 2023, with the removal of the Geographic Restriction, which has effectively improved competition, allowing us to do what Chorus has always had the ability to do and deploy fibre anywhere in New Zealand. When that change was agreed to, the Minister promised to consult on the other changes we had requested, including specifically the duplication of obligations in our Part 4AA Undertakings and our Constitution.

6.22 Our request was made in the context of a competitive landscape for broadband services in New Zealand that has materially intensified. It continues to accelerate rapidly, with more LEO satellite services introduced, and a significant increase in the investment, availability, marketing and update of mobile and FWA services by vertically integrated providers (MNOs, who are also fibre RSPs).

6.23 MNO providers are incentivised by margin gains to promote FWA over fibre; with ONE NZ stating it intention to migrate 25% of its customers to FWA by 2024; and Spark planning to move 30-40% of its fixed line broadband customers to FWA (after announcing in 2023 that ~30% of its broadband customers were already on FWA).[27]

6.24 The data in the table below is taken from the Commerce Commission's Annual Monitoring Reports, and shows FWA share of broadband connections increased from 3% in 2016 to 17% in 2022:

[25] https://www.nzherald.co.nz/nz/chris-bishop-cites-private-sector-spending-for-infrastructure-funding-and-user-pays/HX352IXZJNGI5JLZC3SGR5LTGE/;
[26] https://www.beehive.govt.nz/release/government-announces-budget-priorities
[27] https://businessdesk.co.nz/article/markets/spark-looks-to-fixed-wireless-to-increase-margin; and https://comcom.govt.nz/__data/assets/pdf_file/0029/348743/Enable-Tuatahi-deregulation-draft-assessment-framework-cross-submission-March-2024.pdf, para 5.19; https://www.nzherald.co.nz/business/vodafone-nz-first-to-go-big-with-5g-wireless-broadband/XWMFFS6SG6X36MM2BVBISKOS6Q/#:~:text=Vodafone%20has%20become%20the%20first,There's%20no%20installation%20charge.; https://www.nzherald.co.nz/business/spark-ceo-jolie-hodson-wants-30-40-per-cent-of-fixed-line-broadband-customers-on-wireless/S2O4ZORU7IJ3X66YQAISUYQ4AE/; and Spark FY23 Results Summary p5

Table 2: Fixed Broadband by Technology (%)

	2016	2017	2018	2019	2020	2021	2022
Fibre	368	460	669	880	1,145	1,180	1,259
Copper	1,132	1,000	775	581	441	308	230
Fibre/Copper	1,500	1,460	1,444	1,464	1,486	1,488	1,489
F/C %	**97%**	**93%**	**90%**	**89%**	**87%**	**85%**	**83%**
FWA	40	117	165	188	221	276	315
FWA %	**3%**	**7%**	**10%**	**11%**	**13%**	**15%**	**17%**
Total	1,540	1,577	1,610	1,649	1,707	1,760	1,804

Strong marketing and incentives are offered by FWA retailers, but not for fibre services. These include actively presenting FWA offers first, special pricing, add-ons like in-home mesh Wi-Fi and streaming services – all aimed at moving customers to their FWA services.

6.25 That objective is evidenced in material provided to the Commission by One NZ in support of their proposed acquisition of Dense Air spectrum. An economic report from NERA on behalf of One NZ filed with the Commission on 5 March 2024 describes the relevant product market as "*broadband services (including wireless broadband services)*" [28] and included the following observations:

> "*aside from 2degrees, Spark and One NZ are competing with their mobile networks against Chorus' fibre regulated network*" [29]
>
> "*Chorus faces stranding risk and is therefore incentivized not to lose customers to FWA*" [30]
>
> "*MNOs are incentivised to have broadband customers on their mobile network (which is largely a fixed cost) as opposed to on the fibre network (which is a variable cost)…so we would expect Spark and One NZ to already be competing aggressively to lure customers away from the Chorus network*." [31]

The refence to Chorus in the NERA Report also applies equally to Tuatahi, and we are experiencing the same effect of competing with the unregulated MNOs. Stranding risk can only arise where the infrastructure owner is unable to recover a normal economic return on and of its invested capital. In this case the reason for the risk of under-recovery is conceded by NERA to be competition from FWA.

6.26 Recently, 2Degrees was acquired by Vocus, and that merger generated a wide range of responses because one of the stated purposes of that merger was to convert Vocus' retail customers to FWA services:

> "*The combination of fixed and mobile infrastructure assets should also enable the merged entity to compete with Spark and Vodafone more effectively for the provision of fixed wireless broadband services. An increased customer base, through combining the migration opportunity of 2Degrees' and Vocus NZ's customers from copper to a fixed wireless solution, will offer the merged entity economies of scale, allowing it to provide more competitive services to customers. Fixed wireless broadband increases the overall utilisation of the mobile network, improves return on investment and supports future capital investment.*" [32]

[28] https://comcom.govt.nz/__data/assets/pdf_file/0018/346203/NERA-economic-report-in-response-to-Statement-of-Issues-5-March-2024.pdf at [52a] (**NERA report**)
[29] NERA Report at [55]
[30] NERA Report at [55(b)]
[31] NERA Report [55(c)]
[32] https://comcom.govt.nz/__data/assets/pdf_file/0032/274739/Voyage,-Orcon-and-2degrees-Application-4-January-2022.pdf

6.27 Chorus noted in its response to the Vocus-2Degrees merger proposal that New Zealand having the third highest uptake of fixed wireless services compared with other OECD countries (as at 30 June 2020), which:

> "…*suggests that vertically integrated fixed/mobile network operators are taking opportunities created by the regulatory framework for fixed networks to maximise margin by pushing fixed wireless access service*."

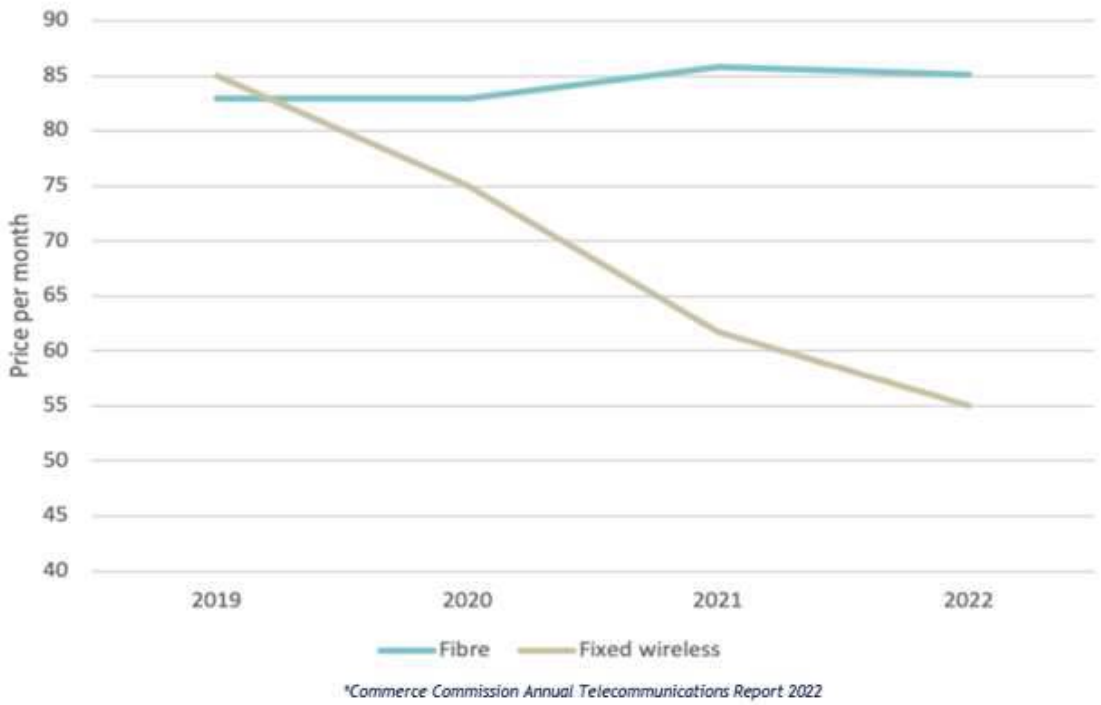
Chorus also submitted that if that merger was approved:

> "…*the market share of integrated fixed/mobile retail service providers would increase from 68 per cent to 81 per cent*,"

In reference to the separation of Telecom's wholesale and retail operations to deliver the UFB project, Chorus noted that process:

6.28 "…*was intended to remove Telecom's advantage from vertical integration and create a level playing field for retail service providers,*" yet "*(t)he rise of vertically integrated fixed/mobile operators and services creates a challenge to this model.*". [33]

6.29 With this unbalanced regulatory regime, it is no surprise that the growth of FWA is predicted to continue. According to GlobalData,[34] fixed wireless currently accounts for 19.5% of broadband connections, and is predicted to grow to 26.3% by 2028. In tandem with the increase in 5G FWA performance and coverage, the retail price of FWA services has fallen significantly since 2019 as shown in the Commerce Commission's data



*Commerce Commission Annual Telecommunications Report 2022

[33] https://comcom.govt.nz/__data/assets/pdf_file/0037/276967/Chorus-Submission-in-response-to-Vocus-and-2degrees-Statement-of-Preliminary-Issues-15-February-2022.pdf,[paras 6, 7 and 8]
[34] Revenue of New Zealand's Fixed Communication Services to Reach $1.56bn (30 Oct 2023) https://www.telecomlead.com/broadband/revenue-of-new-zealands-fixed-communication-services-to-reach-1-5-bn-113201

6.30 That the increase in investment to upgrade 4G and 5G network capability to support FWA growth has coincided with a corresponding fall in the retail price of retail FWA services, yet retail fibre prices increases more than double the wholesale price input increases suggests a degree of cross subsidisation of FWA services by fibre services.[35] FWA connections have increased to 276,000 up 25% from 2020.

6.31 We are now experiencing the impact of that targeted FWA investment and marketing with increased churn (loss of fibre connections and revenue) (*refer to Attachment A, Schedule 1)*. It is imperative the regulatory restrictions in our Constitution are removed to ensure our regulatory settings are re-balanced, to allow us to compete on a level playing field. Our business is heavily reliant on the effort of RSPs to sell our fibre services. If those RSPs stand to benefit more from their competing product offering, there is very little we can do under the current settings to respond by supporting RSPs who want to supply fibre – or even invest in more innovative and wider range of options for consumers.

6.32 For the fibre regulatory framework to be adaptable to the constant and fast changing telecommunications market, and competing broadband technologies, further amendments to the fibre regulatory framework are needed. Specifically, our constitutional changes are needed, to align with our obligations under the Act, allowing us to invest, a level playing field to operate from, and offer more choice to customers. This would support digital equity and inclusion, community safety and critical infrastructure resilience needs. For example, we are prevented from investing in other technologies to launch off our fibre network (e.g. wireless) to deliver telecommunications services to the rural areas located across the Waikato, Bay of Plenty, Taranaki, Whanganui and Hawkes Bay, and surrounding areas. This includes supporting Government and community initiatives, even though we have a fibre network with capacity to provide that service.

6.33 Our recent experience of applying our Constitution controls through Government is that, despite the best intentions of the people involved, the process lacks any formality, timeframes, or urgency, to the point that it is cumbersome and is a disincentive to any desire on our part to invest in growing our fibre or any other form of telecommunications network, increasing access to better broadband and innovation.

6.34 We urge MBIE to use this review process to adopt the same approach as that recommended by the New Zealand Telecommunications Forum (**TCF**) in its submission in response to the Commerce Commission's current copper deregulation review:

> "*It is important for the Commission to review existing regulations and decide whether these are still fit for purpose and proportionate to the harm they were designed to avoid.*"[36]
>
> "*The telecommunications sector has matured and developed significantly since the Act was first established and, most relevantly, since the Commission last gave consideration to investigating the deregulation of the relevant copper services in 2016. This includes the increase in availability of alternative services provided by satellite and wireless technologies, and the expansion of wireless networks (including as a result of government investment through the Rural Broadband Initiative).*" [37]

[35] https://comcom.govt.nz/__data/assets/pdf_file/0026/345095/Enable-26-Tuatahi-public-submission-on-deregulation-draft-assessment-framework-Feb-2024.pdf [paras 8.4 to 8.13]
[36] TCF Submission to Commerce Commission on Copper Services Investigation under section 69AH of the Telecommunications Act 2001 22 May 2024 [4]
[37] TCF Submission on Copper Services Investigation approach paper – 22 May 2024

6.35 We believe the Government has a role to play in supporting improved access to broadband. This was demonstrated in the Government's decision in October 2022 to waive the 3.5GHz spectrum right fees for Spark, ONE NZ and 2Degrees in exchange for each of those MNOs contributing $23M each to improving rural broadband. [38] Those spectrum rights will support the acceleration of 5G investment, not only in rural areas but also in urban areas to compete directly with fibre. This is in addition to the Government's support of those same MNOs via the Rural Connectivity Group to deliver the Rural Broadband Initiative. The details of this long-term allocation are not yet publicly available; however, we believe it demonstrates the Government's willingness to support improving access to telecommunications without obligating the beneficiaries of this type of arrangement to commit to long-term regulatory overheads and restrictions. In this case we are not seeking special treatment, we merely ask the Minister (as we did over two year ago) to agree to remove the unnecessary and obsolete regulatory restrictions in our Constitution so we can compete (subject to our TCA obligations) with our unregulated, vertically integrated broadband technology competitors.

Opportunities

6.36 The restrictions in our Constitution we currently operate under have been the primary reason we are no longer involved in developing opportunities to invest in further improving access to broadband services or other initiatives to support financial and geographical digital equity and inclusion ideas. Examples include:

- Expanding our fibre network into and to support improving access to broadband services in non-urban and rural areas using a mix of fibre and other technologies, such as wireless and non-terrestrial technologies, and customer support services (e.g. routers to improve Wi-Fi performance; customer support services to help ensure their service is correctly set up and operating, or resolve issues)
- Engaging directly to other critical lifeline infrastructure networks (such as lines companies) to develop bespoke fibre (and other technology based) services (and support services) to support their ability to monitor (e.g. SCADA) and improve resilience to restore service quicker to those networks in adverse weather or other events (and we refer your attention to the response to the Discussion Document from Unison Networks)
- Engaging directly with public sector and community run organisations (such as NZ Police and local authorities) to offer fibre services to support public and business safety (e.g. CCTV)
- Supporting private and public sector initiatives to digital equity and inclusion initiatives to improve access to broadband because of our inability to supply services to those households
- Customer experience improvements, such as Wi-Fi capable equipment (which may include an ONTs or other device) would remove the need for separate Wi-Fi routers, and enable us to monitor the in-home broadband connectivity experience, and have real time notification of issues. Layer 3 and 4 restrictions impede these types of developments, which has never been a sensible or justified restriction.

[38] https://www.mbie.govt.nz/about/news/accelerated-5g-roll-out-and-improvements-to-rural-connectivity-to-benefit-new-zealanders

6.37 Our drivers for developing a wider range of services are:

- to deliver better telecommunications (broadband, and voice) services into areas where the deployment of a fixed fibre line network is impractical or uneconomic due to geographic constraints (terrain, supporting infrastructure limitations, etc.)
- to offer a resilience to our own, and third party lifeline, infrastructure networks (fibre, wireless, lines companies, etc.) in the event of an emergency (outage) to help them monitor their networks and communicate with field staff – and this extends to other services which rely on telecommunications services during such events (e.g. medical facilities, community services (like CCTV), banking, EFTPOS, petrol stations, supermarkets)

The investment we are prepared to make in these opportunities can only happen with a reset of our Constitution. Our Undertakings will prevent and mitigate any accusation that we intend to start supplying retail fibre services.

Issue 1: Governance of permitted business activities

Do you agree that it is appropriate to consider changes to the constitutional settings that govern the other LFCs? Why or why not?

6.38 Yes, as we have explained above in sections 6.8 to 6.37 of this response, this review as long overdue, mainly because:

- a number of controls automatically expired when Crown oversight of our wholesale fibre services and charges expired on 31 December 2021 (after a 2-year delay);
- there have significant changes in market competition, digital equity and inclusion and critical lifeline infrastructure resilience challenges, and broadband services and needs (including product innovation) since 2009-10 when the ITP was written and these controls were put in place; and
- our participation in the UFB initiative required our Constitution to contain specific restrictions to ensure we used the Crown (and our own) funding to focus solely on the build and operation of our UFB network. All of those obligations have been satisfied ahead of time and budget. We have now completed the network build (UFB1 in 2016 and UFB2/2+ in 2019) and all of that Crown UFB funding we received has been repaid (in 2016).

Do you agree with MBIE's preferred Option (Option 2), which would allow the other LFCs to operate in any market, with a restriction on supplying telecommunications services to end users? Why or why not?

6.39 We agree that there should be no constitutional restrictions on our ability to operate in other markets if our Board deems it appropriate to do so, and our Shareholder supports that investment.

6.40 We do not agree there are any reasonable grounds for the restriction in clause 4.3(b) of our Constitution which prohibits us from providing any type of services (not just retail fibre services) directly to an end-user (consumer) – whether on or using our UFB network or otherwise – to remain in our Constitution because it is inconsistent with, and go well beyond, the scope of the restriction in clause 7.4 of our Undertakings – which were presented to us and agreed before our Constitution terms were set by the Crown.

6.41 The Discussion Document rules out any changes to clause 4.3(b) of our Constitution on the basis that this is "*a restriction that Chorus is also subject to*". That is incorrect. We are already subject to the same restriction as Chorus by virtue of the Undertakings we gave under Part 4AA of the Act (first, in 2011 (in relation to UFB1), and again in 2017 (in relation to UFB2 and UFB2+).

6.42 Accordingly, there is no policy reason for repeating that restriction in a contract between Tuatahi and the Crown because clause 3.2 in our Undertakings confirms that those Undertakings take precedence over any contract we enter into with the Crown. Indeed, the Minister agreed specifically to consult on "*the alignment of the scope of the constitution with the Deeds of Undertaking*", so ruling this issue "*out of scope*" is directly contrary to that commitment.

6.43 Furthermore, the restriction in clause 4.3(b) is broader than the restrictions that apply to Chorus, as we are prohibited from providing any services to end-users, not just telecommunications services. That means, as noted in sections [6.31-6.33] of this response, we cannot provide services to support end-users that Chorus is permitted to supply.

What impact would there be on competition in other markets if the other LFCs were able to operate in those markets? Do you consider that this needs to be mitigated in some way?

6.44 The impact would be to increase competition by allowing Tuatahi to engage in any new business opportunity our Board deem appropriate, and our shareholder agrees to fund. It will only encourage telecommunications providers to improve their product offers, prices and customer support services.

6.45 There are no potential adverse impacts that require mitigation – Part 4AA and Part 6 of the Act continue to apply to Tuatahi's fibre services.

6.46 This will also allow us to step-in effectively, and quickly, to rectify an issue in the market where the retailers are unwilling to invest, or have demonstrate a reluctance to genuinely invest in improving, such as in-home Wi-Fi performance [39] or offering more customer support for issue resolution.[40]

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

If you are one of the three 'other' local fibre companies, do you have any feedback about the current process? How does the process impact your decisions to seek consent (or not) to operate at layer 3 or 4?

6.47 The process for seeking and obtaining approval under our Constitution controls is too time consuming and unpredictable to justify spending time and investment in developing Layer 3 and above business cases to be submitted to the Minister for approval.

6.48 Our Constitution does not set out the criteria the Minister must apply in considering a request for approval and there is no time limit in which a decision to be made. As noted in paragraphs 6.8 to 6.10 of this response, we have proposed improvements to our Constitution that will remove this barrier to investment.

6.49 In addition, the public nature of the consultation process which is involved would require us to disclose to our competitors the Layer 3 and Layer 4 initiatives we are considering, giving them ample time to bring competing products to market.

[39] https://www.rnz.co.nz/news/national/513702/fast-fibre-let-down-by-internet-users-lousy-wi-fi
[40] https://www.nzherald.co.nz/business/2degrees-revealed-as-the-most-complained-about-telco/RHV7Y6LAIZHDZGA3GUE4ETIHDU/

Do you support any of the Options described above? Why or why not? Are there any other Options that we should consider?

6.50 We do not support either Option. Option 1 is unacceptable for the reasons outlined above. Option 2 (the process set out in relation to Chorus in s 69SO of the Act is also unsatisfactory. As is the case with Option 1, the public nature of the Discussion Document and consultation process which is involved would require us to disclose to our competitors the Layer 3 and Layer 4 initiatives we are considering, giving them ample time to bring competing products to market.

6.51 We submit there is another option that should be considered, and that is the removal of the restrictions in clauses 4.1, 4.2 and 4.3 of our Constitution altogether. In considering whether this is appropriate, we suggest the test to be applied is that set out in s69SA. As we explain below, the removal of the restrictions would be consistent with the promotion of competition in telecommunications markets for the long-term benefit of end-users of telecommunications services, facilitate efficient investment in telecommunications infrastructure and services and will not harm or be likely to harm competition in any telecommunications market.

6.52 The *Telecommunications (New Regulatory Framework) Amendment Bill* initially provided that these restrictions on Chorus be removed from the Act "*to encourage innovation. Because the restriction on participation in retail remained, it was not expected that this would make a significant change to competitive dynamics*".[41] RSPs objected to the removal of the restrictions on the basis that it was a threat to the structural separation model: "*They are concerned that Chorus will be able to move up the value chain while having a pivotal role in supplying their businesses with vital input services*."[42] Unsurprisingly, Chorus' biggest competitors, Spark and ONE NZ, submitted that the restrictions on Chorus should be increased.

6.53 The Select Committee concluded there were likely to be innovation benefits from removing the restrictions[43], but in light of the strong objection from RSPs adopted a suggestion from Internet NZ, supported by the Commission, that the restrictions remain but flexibility be preserved through a Commission exemption regime as "*there may be scope for innovation that does not harm competition*." On that basis, the Select Committee concluded that tighter restrictions did not need to be imposed on Chorus.[44]

6.54 This compromise is not workable. At the time, the reason given by opponents to the relaxation of those controls was "…*that Chorus will be able to move up the value chain while having a pivotal role in supplying their businesses with vital input services*."[45] – which we submit does not stand up to scrutiny because Chorus and the other LFC non-discrimination obligations require that they do not treat themselves differently from other access seekers in the provision of those input services (in this case, Layer 2 services). It is bizarre that the Act imposes on us an equivalence obligation if we supply ourselves with a Layer 2 input service, while our Constitution in effect prohibits us from doing so.

6.55 There are several benefits for customers if we are able to supply Layer 3 and Layer 4 services. We have found through customer surveys that some users who choose fibre broadband plans are not having their expectations fully met because of the poor performance of equipment or service, including:

[41] *Telecommunications (New Regulatory Framework) Amendment Bill Government Bill - as reported from the Economic Development, Science and Innovation Committee Commentary – 293-2* (**Select Committee Report**) [14]
[42] Select Committee Report [18]
[43] Select Committee Report [21]
[44] Select Committee Report [23]
[45] Select Committee Report [18]

- disaggregated network termination and gateway devices, including Wi-Fi access points;
- ineffective setup of Layer 3 network Wi-Fi;
- poor Wi-Fi equipment performance without consideration of radio propagation and channel utilisation; and
- ineffective matching of residential layer 3 devices for optimum coverage and bandwidth.

6.56 The telecommunications industry is going through a period of rapid and unprecedented change, with visions of fully connected buildings and cities, natural voice interaction, automated digital assistance, augmented reality, autonomous vehicles, drone-assisted activities (both aerial and ground based), big data analytics, artificial intelligence, deep learning, cryptocurrency and blockchain transactions all either existing or in development. Any of these developments could open up areas where a network operator can add value by providing services above Layer 2, and where the current requirement to involve an RSP for services beyond Layer 2 is neither efficient, nor in the interests of consumers.

6.57 Moreover, it is completely inappropriate to apply an engineering specification developed 46 years ago as a regulatory service boundary for application in 2024 and beyond. "*Layer 3*" and "*Layer 4*" refer to layers on the Open Systems Interconnection (**OSI**) Model, which was developed by the International Organisation for Standardisation in 1978 to operate as a standard architecture for building network systems. In 2024, the telecommunications industry needs to adapt to the significant technological changes that have occurred in the OSI model was developed.

Section 7: Out of scope: Removing the Government Share is out of scope. The Government made a significant investment in LFCs and has an ongoing interest in ensuring fibre networks are maintained.

7.1 As outlined previously, the Government's investment in Tuatahi was repaid by Tuatahi 8 years ago. The responsibility and incentive to ensure the fibre network is successful, improved, expanded and maintained now lies with the Tuatahi Board, and funded by its shareholders, not the Crown.

7.2 Just as a mortgagor's obligations to its mortgagee are discharged on repayment of the mortgage, we believe there is no basis for the Government Share to continue to apply now the Crown investment has been repaid – and no future Crown funding is available.

7.3 We have attached a mark-up of the changes to our Constitution based on the request we submitted in June 2022. Those amendments are requested for the following reasons:

- they are inconsistent with, and extend well beyond the scope of, the terms offered by the Crown in the ITP, as well as the Act and Undertakings
- a number of defined terms are no longer required following the expiry of Crown oversight of UFB prices and products (i.e. the definitions for *Agreed Pricing Table, Co-Location Services, Communal Infrastructure, Coverage Area, NBAP, Layer 1 Services, Layer 2 Services, Layer 3 Services, Layer 4 Services, OSI Model, Specified Layer 1 Services and Specified Layer 2 Services, UFB Coverage Area, UFB1 Coverage Area, UFB1 Deed of Undertaking, UFB1 Network, UFB1 Network Infrastructure Project Agreement or UFB1 NIPA, UFB1 Objective, UFB1 Open Access, UFB1 Open Access Deed, UFB1 Open Access Requirements, UFB2 Coverage Area,UFB2 Deed of Undertaking, UFB2 Network, UFB2 Network Infrastructure Project Agreement or UFB2 NIPA, UFB2 Objective, UFB2 Open Access, UFB2 Open Access Deed, UFB2 Open Access Requirements* are no longer applicable or required because they are addressed in other instruments, i.e. the UFB2 contract with CIP and the Undertakings) – and also because the wholesale fibre services we supply are defined in the Reference Offer (Wholesale Services Agreement) entered into between us and each of our RSPs
- references to the *UFB2 Network Infrastructure Project Agreement* (*UFB2 NIPA*) and *UFB2 Open Access Deed* are both updated to confirm the date of execution of both documents (i.e. *25 January 2017*)
- references to the *Partner* (Waikato Networks Ltd) and *WEL* (WEL Networks Ltd) are no longer required because those parties are no longer involved (or, since May 2020, have any shares or obligations relating to) Tuatahi; and instead the current shareholder operates under our Subscription and Shareholders Agreement
- the definitions for *Network* and *Services* must be amended to align with the definitions of each of those terms in our Undertakings
- the *Objectives* in clause 4.1 are no longer required now that we have delivered our UFB contract obligations, and Crown oversight of our prices and products has expired
- the *Permitted Scope Of Activities* in clause 4.2 are also no longer required now that we have delivered our UFB contract obligations, and Crown oversight of UFB prices and products has expired, and Parts 4AA (Undertakings) and 6 of the Act control these activities for the UFB networks

- reference to the *UFB1 Deed of Undertaking* is no longer required because that document expired on 31 December 2021
- the *Restricted Activities* (clause 4.3) are inconsistent with, and go well beyond, the restrictions offered by the Crown in the ITP and given in our Undertakings (noting that the deletion of these clauses will not override the restriction in our Undertakings that prevents Tuatahi from supplying retail Services on its Network, which is the intent of the Act)
- the terms relating to the *Limitation on Ownership and Restructuring* in clauses 4.9 and 4.10 are no longer necessary because:
    - the Open Access provisions in the Undertakings address vertical integration issues, as any supply by Tuatahi of telecommunications services to a person with a direct or indirect retail presence must be made on an equivalence basis; and
    - clause 7.4 of the Undertakings prohibits Tuatahi from suppling fibre telecommunications services to end-users
- the clauses setting out the *Rights attaching to Shares* (clause 5) are no longer required because:
    - when we repaid the Crown funding in September 2016 it removed the risk of the fibre network not being build, or recovering that debt
    - the rights attaching to Tuatahi shares are now governed by the Subscription and Shareholders Agreement
    - removing these clauses does not override the control in clause 7.4 of the Undertakings
    - resetting clause 5.9 is intended to provide more clarity and confidence to invest in making future Government Shareholder approval requests

Section 8: Other matters

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

Can you provide examples of where non-regulated fibre service providers are deploying fibre, and what type of specifications this fibre is being built to (ie is it openly available or built for private use, is it wholesaled, or sold directly to customers)?

8.1 Yes, we are aware of a number of non-regulated fibre service providers deploying fibre in and around the areas where we have deployed fibre, namely Lightwire (in Gordonton), Primo Wireless (in Taranaki, including Egmont Village),[46] RexNet and Inspire Net. We do not have any information relating to the fibre network specifications those operators are delivering, although we expect it will not be dissimilar to our fibre network specifications.

8.2 Each of those operators are allowed to operate as a vertically integrated network operator and supplier of (retail) services to consumers. This presents a higher projected average revenue per user (ARPU) return to support the investment case, which we are unable to do or compete with these other operators because the return on investment period is almost three times our current (bank) funding criteria. As a result of our regulatory settings, we are disincentivised from investing in these non-urban/rural areas.

What are your views on the Options we have identified? Do you have a preference, if so, why? Are there any Options we have not identified?

8.3 We see a gap primarily in the "*open access*" nature of regulated fibre networks versus the WISP model. The impact of this needs to be assessed alongside any build specification differences. With this in mind, we prefer Option 1.

Issue 2: Other changes and clarifications

MBIE may seek to include is ensuring the pathway between information disclosure and price-quality regulation is clear.

8.4 The Discussion Paper proposes a change (or clarification) to the Act is needed to avoid "*confusion that the Commission can recommend only a lower level of regulation to the Minister, which is not the case. The Commission can recommend both regulation and deregulation*" [133]

8.5 We submit there is no such confusion in the drafting. Section 210 is very clear that the Commission cannot recommend an increase in regulation from information disclosure (**ID**) to price quality (**PQ**) regulation, which is consistent with the recommendation of the Select Committee in the *Economic Development, Science and Innovation Committee Report on Telecommunications (New Regulatory Framework) Amendment Bill* dated 4 May 2018 (the **Select Committee report**):

[46] https://www.primo.nz/products/residential/egmont-village-fibre

Deregulation review.

The bill would insert new Subpart 7 in the Act, providing for the Commission to undertake reviews of various aspects of the new regulatory framework. New section 208 provides for the Commission to review whether fibre fixed line access services should be deregulated. This is designed to take into account the changing nature of telecommunications technologies that are possible substitutes for fibre.

8.6 The statement in the Discussion Document that the Act does not reflect the 2017 departmental disclosure statement that "*any LFC may later become subject to price-quality regulation, should the Minister accept a recommendation from the Commission that price-quality regulation is necessary*" is correct; however, this statement overlooks the fact that the Select Committee report recommended a different approach, which was adopted by Parliament.

8.7 It is therefore wrong to suggest the heading "*Deregulation review*" is confusing and the Commission can recommend increased regulation. It cannot. The "*small drafting edits*" proposed in the Discussion Document would not be a clarification of confusing drafting as MBIE suggests, but a significant change to the regulatory framework to implement a recommendation made by MBIE in 2017 which was not accepted by the Select Committee following an extensive public and stakeholder consultation process.

Attachment A

Tuatahi Confidential Information

Confidential advice to Government

Confidential advice to Government

Confidential advice to Government

Schedule 2

Tuatahi Land Access and Consent Data

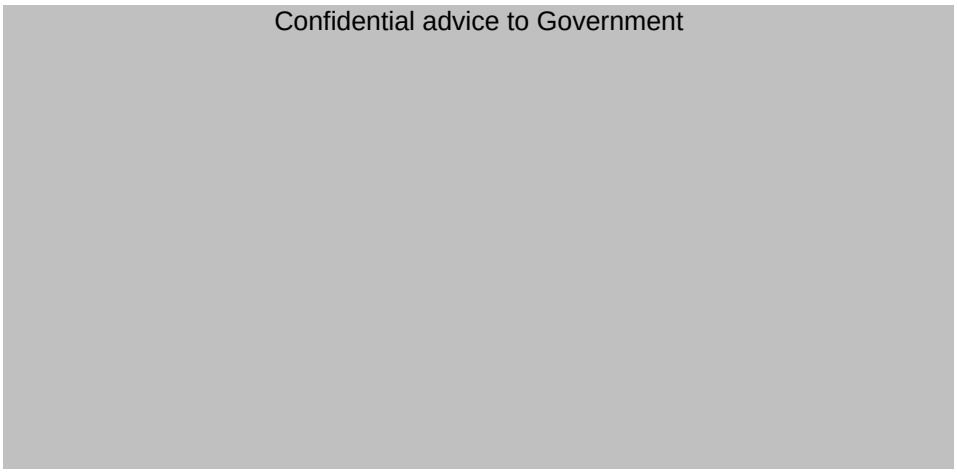
TABLE 1: Data illustrating difference in number of cancelled orders where landowner consent is needed, versus where LAR is invoked:

Calendar Year	Percentage of cancelled orders where statutory land access rights are invoked	Percentage of cancelled orders where consent is needed due to statutory land access rights being unavailable
2022	6%	9%
2023	7%	11%

Business case: An example of a rural business case which would be adversely affected if LAR was not available is Motuoapa is a small town of around 450 residents[47] on the shore of Lake Taupo, located around 9km from Turangi, and 40km from Taupo. The business case to connect this rural town involved a substantial number of shared accessways. On the map of the town below, properties with a shared accessway are indicated by black dots. A total of 27 shared accessway service 135 properties.

The Tuatahi business case to connect Motuoapa is summarised in the below table:

[47] https://citypopulation.de/en/newzealand/northisland/waikato/1216__motuoapa/



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