# Review of the Telecommunications Act – Options Paper

*A submission to the Ministry of Business, Innovation, and Employment*

2 September 2016

Trustpower Limited welcomes the opportunity to provide a submission to the Ministry of Business, Innovation, and Employment as part of its July 2016 *Review of the Telecommunications Act 2001* Options Paper.

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## Executive summary

Trustpower is a challenger brand in a telecommunications market dominated by two large incumbent fixed line and mobile service providers. It has established a reputation for developing disruptive service propositions and offering superior customer service.

Challenger brands are key to achieving the government's long term vision of "a *vibrant communications environment that provides high quality and affordable services for all New Zealanders, and enables the economy to grow, innovate and compete in a dynamic global environment*".

Trustpower welcomes the Government's review of the policy framework that applies to the regulation of telecommunications services, and we support a number of the recommendations in the Ministry of Business, Innovation, and Employment (MBIE) July 2016 Telecommunications Act Review Options Paper.

In particular, Trustpower supports the proposal to introduce a Building Blocks Methodology cost-based price-quality path regulation for fixed line network providers, combined with information disclosure regulation. We would also support a "revenue cap plus anchor products" pricing model, provided the anchor products are fit for purpose and meet the future demands of customers. After a period of regulatory uncertainty, we recommend that this model be adopted in full, applying to both Chorus and Local Fibre Companies (LFCs) without further experimentation in the form of backstop regulation. This will ensure industry focus returns to customer needs, and not second guessing the regulator's next steps.

However, Trustpower is concerned that the priority given to fixed line regulation has meant that the Government has lost sight of some of its other original reform objectives. This submission draws attention to the growing importance of the mobile market in customer service offerings, and suggests additional steps the Government can take to promote access to mobile infrastructure.

We firmly believe that competition in the mobile market is inadequate, and that the existing competition is fragile. This has wider implications than just the mobile market, as access to mobile services will be required for RSPs to meaningfully compete in future telecommunications markets.

We do not believe that the current regulatory regime is providing enough protection against incumbent market power, particularly where there is no vertical separation, such as mobile. We believe that this warrants further consideration by MBIE.

We also recommend the Commission develop a net neutrality transparency code which would enable end users to choose providers not only based on price and speed, but also on traffic prioritisation methods.

We also discuss key lessons from electricity sector policy settings that highlight:

a) the importance of a regulatory regime that provides both economic regulation of monopoly providers, as well as market rules to promote efficiency and competition;

b) the need to have flexibility in the definition of monopoly services as the traditional line between competitive and monopoly services evolve;

c) the importance of ensuring regulation of the monopoly providers is conducted with the goal of promoting competition; and

d) the value of a number of market facilitation powers and responsibilities, such as those afforded to the Electricity Authority.

Addressing these issues in the course of this review will ensure the regulatory framework is sustainable into the future and able to cope with the pace of technological change. This review presents a rare opportunity that should not be missed.

Accordingly, we believe that MBIE should issue another paper to consider how the wider regulatory regime can be amended to more specifically address the issues arising from the pace of change in technology and markets, and the need to protect and promote competition.

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# 1 Introduction

1.1.1 Trustpower Limited (Trustpower) welcomes the opportunity to provide a submission to the Ministry of Business, Innovation & Employment (MBIE) on its July 2016 *Review of the Telecommunications Act 2001* (the Review) Options Paper.

1.1.2 We also provide a report titled "Future proofing Telecommunications Regulation: Lessons from the Electricity Sector" prepared by Castalia as part of our submission.

## 1.2 Trustpower Limited

1.2.1 Trustpower is a rapidly growing electricity, gas, and telecommunications provider. Our growth has been largely organic, achieved through our ability to bundle energy and telecommunications services, creating disruptive propositions and a superior service model. We are New Zealand's fourth-largest telco, and potentially the fastest growing.

1.2.2 We bring to the New Zealand telecommunications market a unique perspective as an experienced and successful participant in a highly-competitive, regulated market setting – the electricity market. We constantly compare and contrast the market rules, structure and competitive behaviour not just between the three markets that we operate within, but also between New Zealand and Australia.

1.2.3 We are positioned as a challenger in a telecommunications market that is occupied by two incumbent fixed-line and mobile service providers, Spark and Vodafone. In entering this market, we have faced a number of barriers to entry. Our submission touches on these, and highlights possible learnings from the electricity sector in both New Zealand and Australia. We are also part way through the process of trying to secure a MVNO agreement with a mobile network operator, as we believe that access to mobile services will be necessary in order to meaningfully compete in future telecommunications markets.

## 1.3 Review of the Telecommunications Act 2001 to date

1.3.1 In preparing this submission, we have reviewed MBIEs process to date, which we summarise below.

1.3.2 In September 2015, MBIE published a Discussion Document outlining the Government's long term vision for "a vibrant communications environment that provides high quality and affordable services for all New Zealanders, and enables our economy to grow, innovate and compete in a dynamic global environment".

1.3.3 This Discussion Document outlined the scope of its review of the Telecommunications Act 2001 (the Act) in achieving this vision, and sought submissions on the future of the communications sector. It identified six issues that the review would address:[1]

> 1. New Zealand's communications regulatory systems may need change to address the reality of a converged sector, and to regulate consistently across networks and content;
>
> 2. our regulatory systems may be unable to cope with the pace of change in technology and markets (for example, in addressing new issues like net neutrality);
>
> 3. jurisdictional issues are arising due to the global nature of the internet, resulting in potentially inconsistent treatment of the same services;
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> 4. communications regulation was designed for a different era and may need to be adapted to reflect today's competitive environment;
>
> 5. uncertainty has been generated from the operation of the telecommunications regulatory regime, and needs to be minimised; and

[1] MBIE, "Regulating communications for the future – Review of the Telecommunications Act 2001", September 2015, p9.

6. we need to maintain and build on competition in mobile markets.

1.3.4 Trustpower supports this vision, and the need to address these issues.

1.3.5 In April 2016, MBIE announced a series of high-level policy decisions on the future of the communications sector.

1.3.6 In July 2016, MBIE published an Options Paper, providing more detail on its high-level policy decisions, and outlining a combination of proposed solutions and options for addressing some of the issues noted in its Discussion Document.

1.3.7 We note that the Options Paper has a strong focus on the regulation of fixed-line networks. We understand that MBIE has decided to shift to a building blocks regime from 2020, and is seeking views on the implementation and design of this framework, including:

a) whether Chorus and LFCs should be subject to both price-quality regulation and information disclosure, or whether a backstop regime should apply, whereby they will be subject to information disclosure regulation only until an intervention test is met;

b) how price-quality regulation should be implemented, namely:

(i) the form of regulation, whether this should be a price cap, revenue cap, or a combined revenue cap with price caps for anchor products;

(ii) the number of Regulated Asset Bases (RABs) for Chorus' assets;

(iii) how the RABs should be valued; and

(iv) the role of anchor and commercial products;

c) how the transition between the current and new regulatory frameworks should be managed; and

d) how copper to fibre migration should be handled.

1.3.8 MBIE is also seeking views on whether changes are required to the existing regulation of the mobile market, and whether there are any changes required to the existing regime to deal with convergence and net neutrality concerns.

1.3.9 However, we are concerned that MBIE has narrowed its focus in its latest Options Paper, failing to address many of the issues it posed in its September 2015 Discussion Document. Most notably to us, the importance of promoting mobile and fixed-wireless competition, as well as network neutrality concerns, do not seem to have been afforded adequate focus.

1.3.10 These are key issues that need to be carefully considered as part of this review in order to ensure that the Government's vision of a vibrant communications market is realised. The Commission needs to be equipped with a toolkit that enables it to respond quickly to changes, and address issues where the line between services that have typically been viewed as competitive, and monopoly services, become blurred, which it inevitably will.

1.3.11 Reviews such as this one are rare. Therefore, while we understand that fixed-line regulation is a priority, we believe that MBIE should issue another paper to consider how the wider regulatory regime can be amended to more specifically address the issues arising from the pace of change in technology and markets, and the need to protect and promote competition.

# 2 Overview of our submission

2.1.1 Our submission addresses the topics raised by MBIE in the Options Paper, and is structured as follows:

a) Section 3 explains why we consider that the future of the telecommunications sector requires a holistic approach to regulation, drawing on learnings from the electricity sector;

b) Section 4 briefly outlines our views on MBIE's regulatory and policy objectives;

c) Section 5 comments on the new regulatory framework to apply to fixed-line services;

d) Section 6 discusses the need to promote mobile competition, and recommends additional steps that MBIE could take in this regard;

e) Section 7 outlines our views on net neutrality;

f) Section 8 suggests additional changes to the Telecommunications Act;

g) Appendix A provides specific responses to MBIEs questions.

# 3 The future of the telecommunications sector requires a holistic approach to regulation

3.1.1 The new regulatory regime for the telecommunications sector will need to be sufficiently resilient and flexible to deal with ongoing change in the future, as new technologies are likely to compete with, and likely supersede, existing ones. We believe that MBIE needs to take a wider, more holistic approach to developing the new regulatory regime, rather than separating the regulation of fixed-line services from the rest of the regime. This regime should have a consumer focus, and ensure that the Commission has an adequate toolkit to deal with future change.

3.1.2 In this section, we outline a number of future trends in the telecommunications sector that MBIE should consider when reviewing the current regime. We are concerned that MBIE has lost sight of these. We then outline the lessons that we have learnt in the electricity sector that are relevant to this review. Key is ensuring that the Commission has a dual focus; on monopoly regulation, as well as an equally strong focus on market rules to ensure efficiency and competition.

3.1.3 Our position is supported by Castalia's report, submitted as an attachment to our submission.

## 3.2 Future trends and emerging technologies in the telecommunications sector

3.2.1 As MBIE stated in its Discussion Document, consumers are going to want access to high quality data services wherever they are:[2]

> New Zealand consumers are increasingly becoming reliant on communications networks and services. Mobility is central. We expect to move seamlessly between fixed and mobile networks at home, at work, or on the move. We expect high quality, too. Consumers want their voice and video calls, delivery of content, and online transactions to be seamless with no degradation of quality as they move between networks.

3.2.2 These trends need to be expressly addressed in this review to ensure that the regulatory regime is sustainable into the future, and is able to cope with the pace of technological change. We discuss a number of these trends below.

3.2.3 Firstly, New Zealand is experiencing significant growth in uptake of, and reliance, on smartphones. Research New Zealand[3] reports smartphone ownership has increased from 48 percent in 2013, to 70 percent in 2015. The 18 to 34 years old demographic has the highest smartphone penetration at 91 percent in 2015. Further, 91 percent of smartphone users report that they use their smartphone every day, compared to about half the year before.

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[2] MBIE, "Regulating communications for the future – Review of the Telecommunications Act 2001", September 2015, p30.

[3] In Research New Zealand, "A Report on a Survey of New Zealander' Use of Smartphones and other Mobile Communication Devices 2015". Available at http://www.researchnz.com/pdf/Special%20Reports/Research%20New%20Zealand%20Special%20Report%20-%20Use%20of%20Smartphones.pdf.

3.2.4 The report also states that "*86 percent of those who are using their smartphone more often, are specifically using it more often to connect to the internet, while two-thirds (64 percent) reported sending and receiving more data files, pics or other attachments*."[4] This increase in mobile internet usage is reflected in the reported average mobile-connected device generating 599 megabytes per month in 2014 increasing to 935 megabytes in 2015.[5]

3.2.5 Cisco forecast mobile internet usage to increase six fold, to a total of 27 Petabytes per month by 2020, representing an average of over 3,800 megabytes per month for a mobile-connect end-user device.[6] The forecast mobile internet traffic in 2020 will represent 12.9 percent of total internet traffic, up from 4.5 percent in 2015.[7] This represents a direct transfer from fixed-line internet traffic, and a trend likely to continue with the introduction of the Internet of Things (IoT) and the fifth generation mobile network.

3.2.6 Secondly, the IoT is stated as being the next evolution of the Internet. The International Telecommunications Union (ITU) has defined the IoT as "a global infrastructure for the information society, enabling advanced services by interconnecting (physical and virtual) things based on existing and evolving interoperable information and communication technologies."[8] IoT presents an opportunity to improve the way we use technology and gather data.

3.2.7 Applications within the IoT range from smart homes, grids, and cities, to agriculture farming and land optimisation. A number of forecasts place the number of connected devices worldwide by 2020 from 20 billion[9] to 50 billion[10]. These devices will likely have two way communication between each other, and the end user. This all translates into more IP traffic, a significant proportion of which may travel via mobile.

3.2.8 Thirdly, the fifth generation (5G) mobile network is currently under development. According to the Next Generation Mobile Networks (NGMN) 5G White Paper, "*NGMN and other stakeholders/partners will work together towards delivering globally and commercially available 5G solutions by 2020.*"[11] This is supported by the vision statement Vodafone included in their submission on the September 2015 Discussion Document:

> We have a bold vision to take wireless technologies further and faster for New Zealanders, and our technology roadmap through to 2025 will see us move from New Zealand's largest and fastest 4G network to 5G and beyond. Our ambitions are for gigabit speeds over mobile, including for rural New Zealand.

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[4] Research New Zealand, "A Report on a Survey of New Zealander' Use of Smartphones and other Mobile Communication Devices 2015", p11. Available at http://www.researchnz.com/pdf/Special%20Reports/Research%20New%20Zealand%20Special%20Report%20-%20Use%20of%20Smartphones.pdf.

[5] Cisco VNI Mobile Forecast Highlights, 2015-2020, New Zealand, 2015 Year in Review. Available at http://www.cisco.com/assets/sol/sp/vni/forecast_highlights_mobile/index.html#~Country.

[6] Cisco, "New Zealand – VNI Complete Forecast Highlights", p3. Available at http://www.cisco.com/content/dam/m/en_us/solutions/service-provider/vni-forecast-highlights/pdf/New_Zealand_2020_Forecast_Highlights.pdf.

[7] Cisco, "New Zealand – VNI Complete Forecast Highlights", p2. Available at http://www.cisco.com/content/dam/m/en_us/solutions/service-provider/vni-forecast-highlights/pdf/New_Zealand_2020_Forecast_Highlights.pdf.

[8] International Telecommunications Union, Recommendation ITU-T Y.2060 (06/2012) "Overview of the Internet of Things", p1. Available at http://www.itu.int/ITU-T/recommendations/rec.aspx?rec=y.2060.

[9] Available at http://www.gartner.com/newsroom/id/3165317.

[10] Cisco, "The Internet of Things – How the Next Evolution of the Internet is Changing Everything", April 2011, p3. Available at http://www.cisco.com/c/dam/en_us/about/ac79/docs/innov/IoT_IBSG_0411FINAL.pdf.

[11] MGMN Alliance, "NGMN 5G White Paper", 17 February 2015, p9. Available at https://www.ngmn.org/uploads/media/NGMN_5G_White_Paper_V1_0.pdf.

3.2.9 The proposed 5G network will deliver revolutionary capability to mobile-connected devices. Nokia recently broadcast a video demonstrating the 5G network achieving 19.1Gbps connection.[12] If commercial 5G can achieve half that speed, it will likely be a better substitute than New Zealand's current fixed-line fibre network.

3.2.10 5G has a long way to come before being commercially viable in New Zealand. However, the significant speeds and low latency demonstrated in the preliminary development stages should be considered in this review in relation to the likelihood of fixed wireless broadband emerging as a viable alternative to fixed line broadband. This technology is continuing to develop, and future 6G and 7G services will be even more ground-breaking.

3.2.11 Finally, in the September 2015 Discussion Document, MBIE stated:

> We do not expect mobile networks to be complete substitutes for fixed networks in their core business of broadband access by 2020. Mobile data services are still likely to provide a less consistent service, and remain more expensive than equivalent fixed line services. For example, with Spark, $79 gets you 5GB of data on an open term mobile broadband plan, whereas customers can get 80GB for $69 and unlimited data for $89 on naked fibre and ADSL plans.

3.2.12 We would like to draw attention to current offers from Spark, and Sparks' subsidiary Skinny for home wireless broadband connected to the 4G network. Spark are currently offering 3 home wireless broadband plans, all with a free modem and a monthly Lightbox subscription (worth $12.99). These plans range from $79.99 for 40GB and Landline, to $84.99 for 80GB naked wireless broadband. Similarly, Skinny is offering 100GB per month for $52 with no contract term, and a $99 modem cost.

3.2.13 It is clear these offers are separate and significantly different to mobile data plans, however, they are delivered using the same infrastructure. These are arguably compelling offers in competition with fixed-line VDSL and ADSL2+ broadband offers. We note, however, that these services are not regulated, and other Retail Service Providers (RSPs) do not have open and non-discriminatory access to them.

3.2.14 As outlined above with the introduction of IoT and 5G, as well as the clear trends of every increasing (mobile) internet usage, end-users will turn to their mobile devices to deliver much of their online content.

3.2.15 We firmly believe that if an RSP does not have access to mobile services at reasonable and competitive prices, they will be unable to meaningfully compete in future telecommunications markets. It will therefore be of fundamental importance that mobile competition is adequately monitored, and that steps are taken to remove or reduce the significant barriers to entry that new entrants currently face. This could be facilitated via the Commission having market regulation powers, similar to those of the Electricity Authority (EA) in the electricity sector.

## 3.3 Lessons from the electricity sector

3.3.1 In both the telecommunications and electricity sectors, traditional supply chain roles are becoming increasingly blurred. We agree with Castalia that MBIE needs to be mindful of the issues around emerging technologies that may blur the line between competitive and monopoly services, as has occurred in the electricity sector.

3.3.2 The telecommunications sector has an additional layer of complexity. While the electricity sector is completely vertically separated, the telecommunications sector is not. We believe that the mobile competition that does exist is fragile due to vertical integration and a lack of effective regulation. As discussed in our previous submission, we believe that the current mobile market allows for the exercise of market power and significant barriers to entry exist for new entrants.

[12] This can be viewed at: https://networks.nokia.com/videos/world-first-nokia-5g-cm-wave-technology-19-1-gbps-over-the-air.

3.3.3 Castalia also points out that:[13]

> [W]hile the regulatory framework behind New Zealand electricity market is being stressed by the emerging technologies, it has the advantage of combing the focus on utility regulation with an equally strong focus on market rules that achieve efficiency and competition… However, since the telecommunications sector does not have its rule-making equivalent to the Electricity Authority, transplanting the current New Zealand electricity regulatory framework to telecommunications, a sector where the impact of disruptive technologies is even greater, is unlikely to be appropriate.

3.3.4 As noted above, the electricity sector has the advantage of two regulators that provide an equal focus on monopoly regulation, as well as market rules to promote efficiency and competition.

3.3.5 However, the separation of the two focus areas has led to policy silos. We agree with Castalia that:[14]

> In principle, the interaction between the Authority and the Commerce Commission should limit the risk of the overall purpose of sector regulation being lost. However, in practice, separating regulation from the promotion of competition leads to policy silos. This risk would be magnified in the telecommunications sector, where the pro-competitive role would no longer be defined.
>
> […]
>
> [A] more appropriate model for both the telecommunications and electricity sectors would be to align the objectives of both the competitive and monopoly sector policies, so that both the market and monopoly interventions serve to promote competition. This would be in line with the approach taken in Australia.

3.3.6 The review of the Telecommunications Act is an opportunity for the Government to consider how the regulation of monopolies fits into a wider regulatory environment, with the promotion of competition being a primary goal.

3.3.7 Specific lessons from the electricity sector's experience include:

a) This review should not hard wire inflexible definitions of the monopoly service into the regulatory regime, as this may create uncertainty and inequity as technology changes, as has occurred in electricity with the definition of electricity lines service.

b) The new purpose statement for the utilities-style regulation of the fixed line services should also include broader objectives such as the promotion of competition and the efficient operation of the telecommunications industry.

c) Care needs to be taken to ensure that the roles and powers of the Telecommunications Commissioner to monitor and oversee market regulation are aligned with the Commerce Commission's role in administering monopoly regulation.

   Castalia recommends that, "*the Government should consider whether the objective statement similar to the Australian National Electricity Objectives, or the more adaptive market regulation powers of the Electricity Authority should be imported to align the rule-making and the monopoly regulation responsibilities*."[15]

d) There may also be a case for policy makers to retain some power to address policy issues that arise in the future, either through government policy statements, or the ability to amend definitions of the monopoly service to reflect market and technological developments.

3.3.8 MBIE should issue a further paper to consider how the wider regulatory regime can be amended to more specifically address the issues arising from the pace of change in technology and markets, and the need to protect and promote competition.

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[13] Castalia, "Future Proofing Telecommunications Regulation: Lessons from the Electricity Sector", September 2016, p1-2.

[14] Castalia, "Future Proofing Telecommunications Regulation: Lessons from the Electricity Sector", September 2016, p15-16.

[15] Castalia, "Future Proofing Telecommunications Regulation: Lessons from the Electricity Sector", September 2016, p17.

# 4 MBIEs regulatory and policy objectives

## 4.1 Regulatory objectives

4.1.1 In its Options Paper, MBIE outlined the following regulatory objectives for the future telecommunications regulatory framework:

a) Promotes competition for the long-term benefit of end-users, and where there is no effective competition, and little or no likelihood of competition, promotes outcomes consistent with outcomes in competitive markets;

b) Encourages efficient investment for the long-term benefit of end users;

c) Supports innovation in communications markets; and

d) Follows regulatory best practice.

4.1.2 In this section, we highlight three areas where we believe that MBIE's current thinking does not best give effect to these objectives.

*Singular focus on fixed line markets*

4.1.3 We are concerned that MBIE's Options Paper is predominantly focused on fixed line markets, and fails to give adequate attention to promoting competition in telecommunications markets more generally. MBIE's Options Paper fails to address a number of issues that it raised in its initial Discussion Document around promoting competition in future converged markets, namely its aim to develop a regulatory regime that:

a) **Is consistent across networks and content**. Instead, MBIE is proposing to separate the regulation of fixed-line networks from other network regulation, including giving it a separate purpose statement. This will entrench the concern that current regulation siloes thinking based on technology, which will not be appropriate in a converged world.

b) **Is able cope with the pace of change in technology and markets** (for example, in addressing new issues like net neutrality). We see MBIEs role as ensuring that the Commission has the tools required to undertake its functions and give effect to the policy enacted by the Government. Where the Government determines that the Commission should promote competition in telecommunications markets, it should ensure that it has an appropriate toolkit and powers to do so.

MBIE's opinion is that existing regulatory processes, such as the Schedule 3 process, will be able to respond where necessary. To assist, MBIE canvassed streamlining the Schedule 3 process. While we support most of these changes, we are concerned that some of the issues faced by the Commission in the future may be complex, and require considerable time to consider and implement.

We would prefer a broadened industry monitoring role, similar to that performed by the EA. Where there are improvements to operational efficiency and reducing barriers to entry, the Commission should have the ability to step in. We believe that the Commission should assume a role, similar to that of the EA, in actively promoting competition in telecommunications markets and taking steps to remove barriers to entry to support new innovative business models entering the market.

c) **Maintains and builds on competition in mobile markets**. As noted in section 3 above, the future of the telecommunications sector will be largely dependent on mobile. We believe that open and non-discriminatory access to mobile networks will enable future competition, and will be necessary to ensure an innovative telecommunications market in the future. While some of MBIEs recommendations for streamlining the current Schedule

3 processes are a step in the right direction, mobile competition should be given more attention given its importance to the future of the sector.

*Encouraging efficient investment*

4.1.4 MBIE's objective to encourage efficient investment for the long term benefit of end users becomes particularly relevant to maintenance and upgrades to the copper network, especially in areas where both copper and fibre are available, and at the fringes of the network where new technologies, such as fixed wireless, may be able to more efficiently provide the same or better service. Where the copper network requires maintenance or upgrades, we believe that alternative investments in more efficient technologies, if these exist, should be incentivised.

4.1.5 We note that geographically averaged prices within networks can distort these incentives, whereby customers that are expensive to serve are effectively cross-subsidised by others on the same network. We do not advocate a change to this approach, as this is now firmly entrenched in telecommunications pricing, ensures an affordable broadband service for all end users, and also acts to remove an often cited barrier to entry in electricity markets.

4.1.6 Accordingly, we believe that future investment should be subject to a Commission approval process. This would ensure that Chorus is not incentivised to continue to invest in areas where it would be more efficient to deploy an alternative technology or service.

*Supporting innovation through stronger access frameworks*

4.1.7 We believe that MBIE is currently under delivering on its objective to support innovation in telecommunications markets, with its focus in the Options Paper on fixed-line networks, rather than future telecommunications markets more generally.

4.1.8 Future competition in the telecommunications sector will depend on access to mobile and fixed wireless technologies. MBIE should ensure that innovation in this space is promoted by ensuring open and non-discriminatory access to these technologies, or providing for avenues to gain access to these technologies, as well as removing other barriers to entry for new innovative and disruptive businesses.

## 4.2 Policy objectives for regulating fixed-line services

4.2.1 In its Options Paper, MBIE outlined the following policy objectives for regulating fixed-line services:

a) Consistency with other utilities;

b) An independent regulator;

c) Smooth transition for basic services;

d) Consumer-led migration to UFB; and

e) Geographical averaging within networks.

4.2.2 We provide a few brief comments on these objectives below.

4.2.3 Firstly, we believe that MBIEs objective to ensure consistency with other utilities should not translate to inconsistency within the telecommunications sector. A holistic and consistent approach to telecommunications regulation is required for the reasons outlined above in section 3.

4.2.4 Secondly, we agree that price volatility between regimes should be limited, and that there should be a smooth transition for basic services. However, we note that the entry-level anchor product proposed by MBIE does not reflect the copper services currently in the market. Accordingly, if the price of this anchor product was set at the UBA price currently in the market, some end users

would effectively be forced to either pay the same amount for a lower quality service, or pay more for an equivalent service.

4.2.5 We believe that the Commission should be left to determine the appropriate specifications of the anchor products, as well as the transition from the products and prices in the market today to those in 2020.

4.2.6 While we agree with the notion of a smooth transition between regimes, MBIE's proposed approach seems to assume that the outcome of the new methodology will mean higher prices in the market. We do not believe that this outcome should be assumed.

4.2.7 Thirdly, we agree with geographical averaging within networks, but share the concerns expressed by MBIE that averaged pricing may incentivise inefficient decision making, particularly at the fringes of the copper network where alternative services, such as fixed wireless, might provide better services more efficiently. We believe that the new regime should incentivise these technologies to be deployed where more efficient to do so than maintaining or upgrading copper.

# 5 New regulatory framework for fixed line communications

5.1.1 This section outlines our views on the new regulatory framework for fixed line communications, noting that we believe this needs to fall under the ambit of a wider telecommunications framework.

5.1.2 In summary, we:

a) Support a shift to a building blocks methodology (BBM);

b) Believe that price-quality regulation and information disclosure should apply to Chorus and Local Fibre Companies (LFCs), and that Chorus and LFCs should be required to apply to the Commission for approval of large projects requiring capital expenditure over a set threshold;

c) Agree that input methodologies (IMs) should be set by the Commission, and that these be subject to merits appeal;

d) Support a single RAB for Chorus containing its copper and fibre assets;

e) Believe that the Commission should determine the RAB valuation methodology, with guidance from MBIE;

f) Support a revenue cap, with price caps for anchor products, but believe that:

   i. The anchor products are fit for purpose and remain a viable alternative to the services made available commercially, they cannot be an inferior set of services based on the lowest common denominator of network capability;

   ii. The service specifications of the anchor products should be regularly updated, i.e. as a minimum every regulatory control period, and the initial specifications and prices should be determined by the Commission closer to the start of the first regulatory period;

   iii. The service specifications of the anchor products should be the same across Chorus and all LFCs, noting that the price may differ; and

   iv. An asymmetric wash up should apply;

g) Agree that prices should remain geographically averaged over each providers network;

h) Agree that MBIE should provide a policy direction to the Commission that the prices should be smoothed to avoid price shocks in the transition between the current and the new regulatory regime. However, this should not assume that the prices will increase; and

i) Agree that, if there is a transition period, the current prices should be rolled forward; and

j) Believe that clawback mechanisms could be added to the Telecommunications Act, similar to those under Part 4 of the Commerce Act.

5.1.3 We discuss each of these in more detail below.

## 5.2 We support a shift to a building block methodology for fixed line networks

5.2.1 We remain of the view that a Total Service Long Run Incremental Cost (TSLRIC) methodology for fixed line networks would not be appropriate, and we support the shift to a building blocks methodology (BBM). We have previously submitted in depth on this issue, and refer to our submission on the September 2015 Discussion Document for more information.

## 5.3 Price-quality regulation and information disclosure should apply to Chorus and LFCs

5.3.1 We remain of the view that price-quality regulation should apply to both Chorus and LFCs. We do not believe that a backstop regime should apply to Chorus or to LFCs.

5.3.2 MBIE noted in its Options Paper that "*LFCs are more likely to have their pricing constrained by the market. They compete against Chorus' copper network (and in the case of Enable, Vodafone's HFC network). They also face some countervailing buyer power from the large national RSPs.*"[16]

5.3.3 We do not believe that competition from copper is going to be a sustainable constraint in the future, because, as noted in the Options Paper, copper will likely be phased out, and LFCs market power is expected to increase.

5.3.4 MBIE also noted that if a backstop regime applied to LFCs, the threat of regulation would persist on the basis of an intervention test. We believe that this would provide inadequate protection. The process for deciding to price-quality regulate if the intervention test is met will likely require evidence of market power over time, which could lead to LFCs taking advantage of market power for a prolonged period before any change is made. We assume that these decisions may also be subject to merits review and/or other appeals, which would further extend the time under which the industry is subject to uncertainty.

5.3.5 A backstop approach would also add complexity and uncertainty to the regime. We believe that uncertainty around the application of the intervention test, and time required to implement a price-quality determination, may undermine investor certainty. There will come a point (likely soon after 2020) when the intervention test will be satisfied, and price-quality regulation will be required under this test. We believe the backstop approach is effectively delaying the inevitable, and creating uncertainty in the interim. We have already had a prolonged period of regulatory uncertainty in the regulation of fixed line services.

5.3.6 We remain of the view that information disclosure should apply to both Chorus and LFCs. The Commission should be required to prioritise subsequent summary and analysis of this information, as well as be required to maintain a public database, allowing public access to the information in an easily accessible format.

## 5.4 Input methodologies, including a capital expenditure input methodology, should be set by the Commission

5.4.1 We support the establishment of input methodologies in order to provide predictability for regulated suppliers, RSPs, investors, and end users. These input methodologies should be subject to a merits review, and should be reviewed not later than every 7 years, as occurs under the Part 4 regime.

[16] MBIE, "Telecommunications Act Review: Options Paper", July 2016, p64.

5.4.2 The Options Paper outlines that MBIE "proposes to mirror section 52T of the Commerce Act, which would require the Commission to set upfront input methodologies for matters such as:

a) methodologies for evaluating or determining:

(i) cost of capital;

(ii) valuation of assets, including depreciation, and treatment of revaluations;

(iii) allocation of common costs (if necessary); and

(iv) treatment of taxation;

b) regulatory processes and rules (including requirements for expenditure proposals); and

c) pricing methodologies and other matters relating to price-setting."

5.4.3 While we do not support the backstop approach, we agree that, if the backstop approach is adopted, that the input methodologies should be set in advance to enable the Commission to quickly implement price-quality regulation if the intervention test is met.

5.4.4 MBIE is also proposing to require input methodologies for network and service quality matters. We agree.

*Commission approval of capital expenditure*

5.4.5 One of the challenges with BBM regulation, not faced by TSLRIC regulation, is that the price depends on investment. That is, the more the regulated supplier invests, the higher it's allowed revenue will be at the next reset. This requires safe-guards against over-investment.

5.4.6 Chorus and LFCs should be subject to a network upgrade and capital expenditure approval regime. This could be implemented through a piece of legislation mirroring section 54RS of the Commerce Act 1986, which required the Commission to set the Capex IM that applies to Transpower. The Capex IM requires Commission approval of capital expenditure over a certain threshold.

5.4.7 This is particularly important for Chorus. The approval process would ensure that there are appropriate ex ante checks in place to ensure it does not invest in parts of its copper network where deploying an alternative regulated service could be more efficient, but because of geographically averaged pricing, would not otherwise be incentivised. We also believe that there should be careful ex post assessments of investments to ensure that they are efficiently managed within the set allowance.

*Merits review processes*

5.4.8 We support merits review appeals for input methodologies. In Part 4, the merits review process has provided a useful precedent. While there was uncertainty before and during the merits review process, the December 2013 High Court decision has created a precedent which has enhanced certainty and regulatory stability under Part 4.

5.4.9 So long as the merits review process is carefully structured, to include continuation of the original Commission decision until and unless overturned by the court, the merits review appeals can be limited in terms of time, impact and cost. As demonstrated under Part 4, a single lengthy decision has provided certainty, to the benefit of all parties and the Commission. There are considerable sums at stake for stakeholders, consumers and New Zealand, implying that appeals limited to errors of law are insufficient.

5.4.10 Further, we believe that the Court has the required expertise to adjudicate on regulatory matters, especially when joined by two lay specialists, as provided for under the Part 4 regime.

## 5.5 We conditionally support a single Regulated Asset Base for Chorus

5.5.1 We support a single RAB as outlined by MBIE, and believe that this should be specified in legislation. However, we note that a single RAB will not reflect the individual costs of Chorus' copper and fibre networks, and that this might incentivise inefficient expenditure.

5.5.2 As explained in section 5.4 above, we believe that upgrades and maintenance of the copper network should only be incurred where deploying an alternative regulated service would not be more efficient. This could be achieved via an input methodology, similar to the Capex IM that applies to Transpower.

## 5.6 The Commission should determine the RAB valuation methodology with guidance from MBIE

5.6.1 We believe that the Commission should determine the RAB valuation methodology with guidance from MBIE.

5.6.2 We note that, in Part 4, the 'line in the sand' approach was used to set the initial RAB valuation for Electricity Distribution Businesses (EDBs). We do not believe that a 'line in the sand' approach should be used to justify a TSLRIC asset base valuation for Chorus' copper assets.

5.6.3 The move to the BBM reflects a fundamental change in approach. The BBM is intended to provide a fair return of and on efficiently incurred expenditure to build an existing network, while, the TSLRIC methodology reflects the efficient costs of deploying a hypothetical network today. To entrench the asset base from a fundamentally different approach would undermine the rationale for changing methodology.

5.6.4 The Commission is unequivocal in its view that, in regard to asset valuation, "*TSLRIC … differs from the approach taken under Part 4 of the Commerce Act*."[17]

5.6.5 We note, however, that a historical costs approach may be difficult to determine. Some pragmatism will be required. Accordingly, we would support the use of a replacement costs approach that looked at the costs of efficiently deploying a network (i.e. the TSLRIC asset base), and then depreciating that to a level equivalent to existing assets. This could be a suitable middle ground.

5.6.6 We believe that the fundamental difference in approach, and the reasons for that change, should be provided to the Commission as guidance in selecting an appropriate RAB valuation methodology. This would enable the Commission to make the decision on the best approach that reflects the change in methodology, taking into account the information available to them.

## 5.7 We conditionally support a revenue cap with a price cap for anchor products

5.7.1 We support a revenue cap approach, with price caps for anchor products, provided that:

a) The anchor products are fit for purpose and remain a viable alternative to the services made available commercially, they cannot be an inferior set of services based on the lowest common denominator of network capability;

b) The service specifications of the anchor products are regularly updated, i.e. at a minimum every regulatory control period, with the initial specifications and prices determined by the Commission close to the start of the regulatory period;

c) The service specifications of the anchor products are the same across Chorus and all LFC's, noting that the price may differ; and

[17] Commerce Commission, "Final pricing review determination for Chorus' unbundled copper local loop service", 15 December 2015, [289].

d) An asymmetric wash up applies.

5.7.2 Our primary concern with this "revenue cap and anchor products" approach is that the anchor products should not become the poor cousins of the commercial services. MBIE's current proposal seems to translate the current copper price to a constrained, low speed service that does not reflect the service most copper end users currently receive. That is, the existing copper service is a full speed/full speed, largely unconstrained service, so to introduce an anchor product at the same price with a speed cap would not be comparable to this.

5.7.3 The Commission is currently working through its section 30R review of the current UBA Standard Terms Determination, focusing on the service requirements of the current UBA service. It will be able to apply this learning and thinking to setting the anchor products.

5.7.4 Careful thought needs to go into setting the anchor products. We believe that the Commission will be best placed to determine the appropriate role of anchor products in the market, to establish their specifications, and to decide their prices within the revenue cap accordingly.

5.7.5 MBIE should determine the high-level approach of a "revenue cap and anchor products". The Commission should determine the appropriate role of anchor products in the market with respect to commercial services, and establish their specifications and prices, taking into account the overarching revenue cap, and comparisons to services and prices currently in the market.

5.7.6 We agree with MBIEs notion of an asymmetric wash up: if the revenue cap is exceeded then there is a wash up, but if there is under-recovery then there would be no wash up. We think that regulated suppliers as well as consumers should bear some of the risks associated with competition and technology changes and not be fully insulated from these events. Chorus and LFCs will be best placed to respond to market demands through negotiating commercial services with access seekers.

5.7.7 We also support MBIEs proposal that, subject to meeting a legislative test, the Commission should be able to investigate and recommend to the Minister that changes are needed to the form of price control, including potentially moving to a price cap approach for a wider group of product offerings. As part of this process, the Commission should be required to consult with interested stakeholders. This threat of a more intensive form of price control will balance the flexibility provided to regulated suppliers in relation to the commercial services.

## 5.8 Prices should remain geographically averaged over each providers network

5.8.1 We believe that prices should be geographically averaged over each of Chorus and LFCs networks. This will ensure that each provider has the opportunity to recover an efficient return on and of investment, as well as guaranteeing all end users an affordable broadband service.

5.8.2 From our experience in the electricity sector, averaging wholesale prices also makes it easier for new entrants to participate and compete. As we noted in our previous submission, while there are strong reasons for not averaging wholesale prices in electricity, the lack of averaging and the complexity of having to price differently in different regions (due to differences in not just wholesale but also network costs) is often cited by new-entrant electricity retailers as a barrier to competition.

## 5.9 Revenue and prices should be smoothed to avoid price shocks

5.9.1 We agree that price volatility should be minimised during the transition between regimes. We agree with MBIE's proposed solution of providing explicit policy objectives to the Commission to minimise revenue volatility, as well as smoothing any price increases for anchor products.

5.9.2 We believe that if the Commission smooths the revenue cap for regulated suppliers, that the price volatility of anchor products would also likely be reduced. However, MBIE's proposed solution removes all doubt.

5.9.3 We note, however, that there seems to be an underlying assumption that the revenue and price caps will increase from those in the market today. We do not believe that this should be assumed.

## 5.10 Current prices should be rolled forward in a transition period

5.10.1 As an investor in long-lived, capital-intensive generation assets in a regulated market setting, we are aware of the importance of regulatory certainty on minimising cost of capital, and the impact that uncertainty can have on long term benefits of end users.

5.10.2 Any significant changes in regulatory frameworks that have the potential to impact on investor confidence must follow best-practice regulatory change-management principles, which include adequate and appropriate transitions.

5.10.3 We agree that a transitional arrangement should be in place if the new framework cannot be implemented before 2020, and agree with the notion of a price freeze as at December 2019. We believe that it would undermine the stability of the regime if an alternative pricing structure was introduced prior to the new framework being implemented.

5.10.4 As outlined in our previous submission, the processes applied in Part 4 of the Commerce Act for the transition to the BBM could be appropriate in this context. Notably:

a) Based on the Transpower IPP example, if legislation to place Chorus' copper and Chorus'/LFCs' fibre networks under Part 4 type regulation was put in place by October 2017, and the Commission is able to put in place Chorus' and the LFCs' IMs by December 2019, and then determine Chorus' copper and fibre prices by 2020, then these prices would apply;

b) If the IMs and price-quality path determinations were not in place by 2020, the Commission could have discretion to temporarily roll-over existing prices;

c) The Commission could then adopt a transitional mid-period reset once the IMs were completed;

d) The transitional mid-period reset could provide for claw-back (through future access prices) for any under/over recovery caused by the delay in the reset; and

e) If the Commission required Chorus to lower its prices, the Part 4 provisions provide that "*the lowering of prices must be spread over time in order to minimise undue financial hardship to the supplier*" (s 52D(2)).

5.10.5 Similarly, the ACCC made Final Access Determinations (FADs) for six declared fixed line services in July 2011 and a FAD for the wholesale ADSL service in May 2013. All seven FADs were due to expire on 30 June 2014.

5.10.6 The ACCC was not able to complete the FAD inquiry process in time for new prices to take affect from 1 July 2014, so on 18 June 2014 it extended, under section 152BCF(10) of the Competition and Consumer Act 2010, the expiry date of the 2011 and 2013 FADs to be the day immediately before the day on which the access determinations for the next regulatory period come into force.[18,19]

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[18] The ACCC extended the inquiry period for making the FADs by the maximum period of six months on four occasions. The ACCC published, under section 152BCK(3) of the CCA, notices of extension to the decision making period on 11 December 2013, 2 July 2014, 10 December 2014 and 1 July 2015.

[19] ACCC, "Public inquiry into final access determinations for fixed line services - Final Decision", October 2015, p2.

5.10.7 Section 152BCF(10) of the Competition and Consumer Act 2010 states:

> **Extension of access determination**
>
> (10) If:
>
> (a) an access determination (the original access determination) relating to access to a declared service is in force; and
>
> (b) the Commission has commenced to hold a public inquiry under Part 25 of the Telecommunications Act 1997 about a proposal to make another access determination in relation to access to the service; and
>
> (c) the Commission considers that it will make the other access determination, but will not be in a position to do so before the expiry date for the original access determination;
>
> the Commission may, by writing, declare that the expiry date for the original access determination is taken to be the day immediately before the day on which the other access determination comes into force.

5.10.8 This would be a simple and pragmatic approach to deal with the transition to a new regime if the Commission was unable to make price determinations by 2020. The main difference between the Australian approach, and the Commerce Act provisions, is that the Australian Competition and Consumer Act does not provide for claw-back, which meant the delay resulted in end-users paying more for access services for an additional year.

## 5.11 Clawback mechanisms should be added to the Telecommunications Act

5.11.1 We believe that clawback mechanisms, not backdating, should be added to the Telecommunications Act.

5.11.2 In our previous submission on the September 2015 Discussion Document, we outlined a number of reasons why we believed that backdating should not be applied. We refer to that submission for more information.

5.11.3 We also note that the Telecommunications Act is silent on backdating. This creates some uncertainty in terms of when and how backdating would apply. This uncertainty was evidenced in the UCLL and UBA TSLRIC determination process, which provided a good illustration of the problems with backdating. There was much debate and uncertainty as to whether backdating was mandatory, and whether the Commission has discretion to apply backdating or not.

5.11.4 MBIE should clarify in legislation that backdating does not apply to any form of price regulation under the Telecommunications Act 2001.

5.11.5 MBIE is also considering whether to, consistent with Part 4, introduce mandatory claw-back mechanisms for the regulation of fixed-line services. This would be consistent with MBIE's policy direction to minimise price shocks. For example, Part 4 of the Commerce Act 1986 specifies when claw-back must be applied, and when the Commerce Commission has discretion over whether claw-back is applied, as follows:

a) "If the Commission requires a supplier to lower its prices, it must also require that the lowering of prices must be spread over time in order to minimise undue financial hardship to the supplier" (s 52D(2));

b) "If the Commission allows a supplier to recover any shortfall, it must require that any recovery must be spread over time in order to minimise price shocks to consumers" (s 52D(3));

c) claw-back must be applied where (i) an IM has changed as a result of an appeal; and (ii) the changed IM, if it had been applied, would have resulted in a materially different price-quality path (s 53ZB);

d) the Commerce Commission has discretion whether to apply claw-back for CPPs (s 53V);

e) the Commission has discretion whether to apply claw-back as part of the transition to the new Part 4 price control (s 54K and 55F).

5.11.6 MBIE also notes that it does not think that there is a need to specify in legislation that claw-back should apply within the existing framework in the Telecommunications Act. If MBIE believes that claw-back should apply only to fixed-line services, then this should be explicitly stated. However, we are unsure of the rationale for having a different approach for fixed-line services, other than consistency with the Part 4 approach. As noted earlier, we believe that consistency across telecommunications services is important also.

# 6 Competition in mobile markets

6.1.1 We firmly believe that competition in the mobile market is inadequate, and the competition that does exist, is fragile. Our view remains unchanged from the position presented in our previous submission.

6.1.2 Meaningful competition in the mobile market is unlikely under the status quo. As per our previous submission, Trustpower believes, and overseas evidence supports, meaningful competition requires a healthy MVNO market which does not exist in New Zealand.

6.1.3 We note that MBIE, and other market participants, hold the view that there is adequate mobile market competition, citing the reduction in prices of mobile plans since the entry of 2degrees. Achieving commercial viability remains challenging for 2degrees. An effective regulatory regime would have facilitated a smoother entry for 2degrees and avoided inefficient investment in network infrastructure.

6.1.4 The reliance on a third participant (2degrees) that is struggling to achieve commercial viability, to ensure a sustainable competitive market, is precarious.

6.1.5 This has wider implications than just the mobile market. As we outlined in section 3, access to mobile services will be required for RSPs to meaningfully compete in future telecommunications markets. Barriers to entry must be reduced in order to promote competition across a variety of products and service offerings.

6.1.6 Our view is that the current regulatory regime is not providing enough protection against incumbent market power, particularly in emerging broadband markets, such as mobile, where there is no vertical separation. We believe that this warrants further consideration by MBIE, and would support a further options paper that addresses options to alleviate these concerns.

## 6.2 Mobile Virtual Network Operators in New Zealand

6.2.1 We remain of the view that the current regulatory framework is ineffective at promoting services-based competition in the mobile data market, and the framework will become more out of step in future as the demand for mobile data continues to increase, and traditional voice and text-based mobile services become less relevant.

6.2.2 The addition of MVNOs to the future telecommunications market in New Zealand is going to be essential to ensuring meaningful future competition. MVNOs will also bring new innovative and disruptive business models, and, as we outlined in our previous submission, have been correlated with decreased prices for mobile data in other jurisdictions, as demonstrated in Figure 1 below. Most of the countries with low price points for 5GB 4G services have a robust level of MVNO activity based on overall market share.

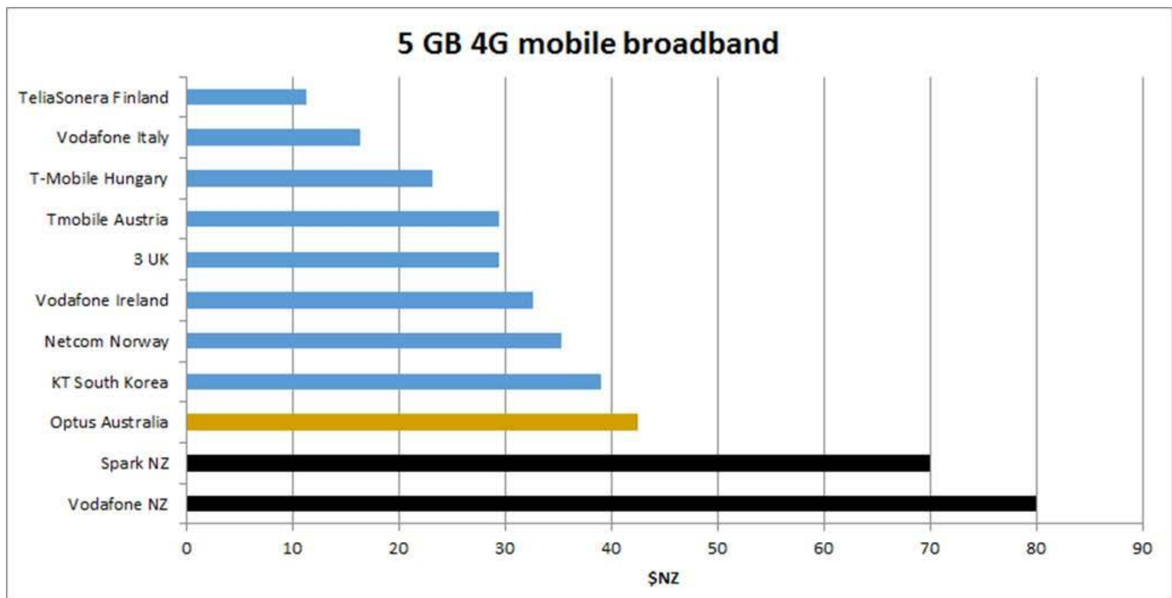


**Figure 1: Comparison of New Zealand higher value monthly plans to comparable jurisdictions[20]**

## 6.3 Increased role of the Telecommunications Commissioner to intervene in mobile retail markets

6.3.1 We previously submitted that the Telecommunications Commissioner should take a more hands-on approach to promote competition in retail markets, similar to the role of the EA in the electricity sector. However, MBIE considers that "the Commission has the tools to address the most significant issues that give rise to anticompetitive conduct in telecommunications markets."[21] We respectfully disagree.

6.3.2 New entrants face tremendous barriers entering the mobile market. The options are to either roll out their own network, which is prohibitively costly and inefficient, or enter into prolonged negotiations with suppliers. Only at this point would a new entrant be equipped with evidence to support a request that the Commission commence a Schedule 3 investigation, which would be onerous, costly, and lengthy.

6.3.3 The Telecommunications Commissioner should have the responsibility of more actively monitoring the telecommunications environment, and removing or reducing barriers to entry. We believe that the Telecommunications Commission will need an enhanced toolkit in order to undertake this task.

6.3.4 MBIE should issue a further paper to consider how the wider regulatory regime can be amended to more specifically address the issues arising from the pace of change in technology and markets, and the need to protect and promote competition.

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[20] Data drawn from variously publicly available sources, including information available from each operator. This was undertaken almost a year ago, so may be slightly out of date. However, the theme that an increased market share of MVNOs has been shown to correlate with decreased mobile data prices remains true. More information is available in our attachment to our submission on the September 2015 Discussion Document for more information. Available at http://www.mbie.govt.nz/info-services/sectors-industries/technology-communications/communications/regulating-the-telecommunications-sector/review-of-the-telecommunications-act-2001/submissions/Trustpower%20submission%20attachment%20MVNO%20report.pdf.

[21] MBIE, "Telecommunications Act Review: Options Paper", July 2016, p83.

## 6.4 Changes to the Schedule 3 test

6.4.1 MBIE has recommended three changes to streamline the Schedule 3 process, as well as one change to mitigate the risk of harm during a Schedule 3 process. We discuss each of these in turn below.

6.4.2 Firstly, MBIE recommends that that the requirement in section 4(1) of Part 1 of Schedule 3 for the Commission to make 'reasonable efforts' to prepare and deliver its final report to the Minister no later than 120 working days after public notice is given at the start of the process to be changed to a 'hard' deadline.

6.4.3 We do not believe a creating a 'hard' deadline would assist in streamlining the processes, especially where the issue is a contentious one, or is not clear-cut and requires significant investigation. Situations where additional time is required by the Commission should be allowed for.

6.4.4 Secondly, MBIE recommends streamlining the Commission's process for carrying out investigations into changing a 'specified' service to a 'designated' service under Part 2 of Schedule 3. MBIE is of the view that "changing how a regulated service is regulated is more of a technical matter that does not require the same level of investigation and scrutiny as investigating the *introduction* of regulation."[22] We agree, and believe that this change should be legislated.

6.4.5 Thirdly, MBIE recommends changing the process under Schedule 3A for undertakings to include a requirement that an access provider is only able to have one attempt at providing an undertaking to the Commission in lieu of regulation being imposed. We agree, and again believe that this change should be legislated.

6.4.6 Finally, MBIE proposes that the Commission should have the power to set an interim price for a potentially regulated designated service that applies during a Schedule 3 investigation. Some form of wash up would be necessary after the investigation. We do not believe this would be appropriate. Interim prices create unnecessary uncertainty and complexity for the industry. We also believe that this goes against best regulatory practice, as it is effectively price-regulating a service prior to deciding that the service should be regulated. This undermines the notion that the regulator has an open mind by assuming a certain outcome.

# 7 Net neutrality

7.1.1 We believe that Internet NZ, in its paper titled "Network Neutrality in New Zealand" outlines some of the pressing topics regarding net neutrality that MBIE should be considering in its review. We discuss some of these topics below.

7.1.2 Internet NZ explains that it is important to develop a workable definition of net neutrality that accounts for what is reasonable and accepted network practice in New Zealand. Of key relevance to this is the intent of the action taken. For example, actions taken to preserve or enhance customer experiences, or to prioritise traffic so that the scarce resource can be equitably shared, should not violate the definition of net neutrality.

7.1.3 At the crux of net neutrality issues is consumer choice. In order for customers to make informed choices, the different propositions offered by ISPs need to be transparent. If an ISP prioritises certain traffic, this should be clearly and explicitly bought to the customer's attention.

7.1.4 MBIE noted that the majority of submitters felt that structural separation and strong retail competition protect our market from the incentives that led to net neutrality concerns in other jurisdictions. While we agree that retail competition in the fixed-line broadband markets is fairly

[22] MBIE, "Telecommunications Act Review: Options Paper", July 2016, p89.

strong, we note, as explained in section 3, that future competition in the telecommunications sector is going to depend on access to mobile services. We believe that mobile and fixed-line incumbents such as Vodafone and Spark will be most likely to partake in prioritisation, zero-rating, or sole content provider activities with the intent of foreclosing competitors.

7.1.5 These issues have recently become increasingly relevant, with the proposed merger of Vodafone and Sky, of which many in the industry have opposed, citing net neutrality concerns. We refer to our submission to the Commerce Commission on this for more information.

7.1.6 MBIE also noted that the transparency requirements under the Broadband Product Disclosure Code were mentioned in submissions on the Discussion Document as "*supporting end user choice and promoting transparency for end users.*"[23] Internet NZ, however, note that while "*ISPs have to be open about what they are providing to their end users and at what price, … they don't have to publish any deals they do with content providers.*"[24]

7.1.7 We believe that MBIE should consider requiring the Commission to develop a net neutrality transparency code. This would have a different purpose to the existing TCF code, and would instead require each ISP to clearly articulate to end users and the Commission how it prioritises traffic, and the deals that it makes with content providers. End users will then be able to choose providers not only based on price and speed, but also on traffic prioritisation methods. The Commission will also have better access to the information required to identify whether or not a problem exists.

# 8 Additional changes to the Telecommunications Act

8.1.1 In this section, we outline a number of changes to the Telecommunications Act that we believe should be addressed as part of this review. These include:

a) Expanding the role of the Telecommunications Commissioner;

b) Providing for the use of regulator convened industry advisory groups;

c) Adoption of a number of provisions in the Electricity Industry Act; and

d) Methods to address other vertical integration issues.

## 8.2 Expanded role of the Telecommunications Commissioner

8.2.1 We remain of the view that role of the Telecommunications Commission should be expanded. Our view, outlined in our submission on the September 2015 Discussion Paper, is that the Telecommunications Commissioner should be enabled and required to adopt a more "hands on" approach to the promotion of competition, the formulation of codes and the management of the sector, mirroring the approach adopted by the Electricity Authority in the electricity sector. We believe that MBIE should review the Electricity Authority's approach, and look to introduce similar functions by amending Section 9A of the Telecommunications Act.

8.2.2 The Electricity Authority has undertaken a substantial number of initiatives to reduce barriers to entry and to promote competition over the last five years. These include, but are not limited to, initiatives such as:

a) The establishment of a central registry of electricity connection (ICP) data and supporting processes and rules to ensure that customer switching is carried out in support of LTBEU;

[23] MBIE, "Telecommunications Act Review: Options Paper", July 2016, p92.

[24] Internet NZ, "Network Neutrality in New Zealand – Public Discussion Document", June 2015, p9.

b) Code amendments to require greater standardisation of certain components of distributors' use-of-system agreements, including caps on distributor prudential requirements;

c) Code amendments to establish standards in consumer contracts and amendments for the protection of vulnerable consumers; and

d) Undertaking "WhatsMyNumber" campaigns, including the website www.whatsmynumber.org.nz to raise awareness about the potential savings from switching power companies, and to help consumers identify which supplier they should switch to.

8.2.3 We also remain of the view that these functions should sit with the Commerce Commission, under the remit of the Telecommunications Commissioner, rather than with a separate body. In particular, given the small size of New Zealand, and limited resources, splitting the role into two will be difficult to manage. We also remain of the view that the TCF will not achieve these outcomes in its current form, as it makes decisions that are in the best interests of incumbent retailers who have effective control of the TCF Board and its activities.

## 8.3 Use of regulator convened industry advisory groups

8.3.1 We remain of the view that the Telecommunications Act should provide for the use of advisory groups. The use of industry advisory groups is a long-standing feature of the electricity industry. The membership of these groups is typically diverse, covering electricity generators, retailers, major consumers, consumer advocates, financial institutions and other parties with an interest in the industry. We have participated in many different groups over the past 20 years, in New Zealand and Australia, and generally find them an extremely useful part of the regulatory process. They provide a useful complement to the knowledge held within the regulator.

8.3.2 Furthermore, these advisory groups often (and where appropriate) include consumer representatives, ensuring advisory group recommendations are balanced and support the long term benefit of end users.

8.3.3 The Electricity Industry Act requires the EA to establish advisory groups to provide independent advice to the EA on development of the Electricity Industry Participation Code and on market facilitation. The Act also requires the EA to establish a charter on how the advisory groups must operate. A number of different groups currently provide the EA with specialist independent and technical advice and recommendations.

8.3.4 We consider that the Telecommunications Act should similarly provide for the Telecommunications Commissioner to establish advisory groups, rather than relying solely on the TCF.

8.3.5 While the TCF has been useful for establishment of certain codes, over the ten plus years of existence, it has not been engaged in proactive engagement in identifying of barriers to competition and continuous improvement. The TCF has the drawback, compared to the EA's advisory groups, that its membership is narrower. The TCF working groups do not normally have an independent chair, and the TCF voting rights favour the larger incumbent operators (particularly "Tier 1" members), relative to small entrant retailers (particularly "Tier 3" members), despite the latter representing the majority of the TCF membership. Importantly, the TCF no longer has a consumer representative on its board.

## 8.4 Provisions in the Electricity Industry Act that could be adopted

8.4.1 We remain of the view that MBIE should consider whether provisions relating to the function of the Electricity Authority in the Electricity Industry Act should be adapted for the Telecommunications Act. For example, equivalents of the following:

a) a requirement to maintain a register of industry participants (s 16(1)(a) of the Electricity Industry Act);

b) a requirement to make and administer the Electricity Industry Participation Code (s 16(1)(b) of the Electricity Industry Act), which may contain, amongst other things, "*any provisions that are consistent with the objective of the Authority and are necessary or desirable to promote … competition in … and the efficient operation of … the electricity industry*" (s 32(1)(a) of the Electricity Industry Act);

c) a requirement to undertaken market-facilitation measures, and monitor the operation and effectiveness of market-facilitation measures (s 16(1)(f) and s 45(a)(ii) of the Electricity Industry Act); and

d) a requirement to promote to consumers the benefits of comparing and switching retailers (s 16(1)(i) of the Electricity Industry Act).

8.4.2 This review should also consider the adoption of the equivalent of s 42 of the Electricity Industry Act. Section 42 details seven priority areas (five related to reducing barriers to entry), stemming from the Ministerial Review of the electricity industry in the late 2000s. The Electricity Authority was required to address those areas within a year.

8.4.3 The Ministerial Review examined the issue of vertical integration (generation and retail) in the electricity sector and concluded that there were in fact net benefits to consumers from vertical integration, in terms of efficiencies. However, retail competition specifically was potentially suffering as a result. The establishment of the hedge market was designed to provide greater transparency of the true price at which wholesale energy was transferred between the generation and retail components of the supply chain. This enabled new-entrant participants not only to be able to access wholesale product in order to manage their spot price exposure, but to acquire it at a price at which they could have confidence they were not being disadvantaged in comparison to those that had their own generation capacity.

8.4.4 This is analogous with the development of the fixed-line open access model in the telco sector, but is in contrast to the lack of a wholesale market for mobile services.

8.4.5 Section 42 also required the Authority to produce a report, if all the priority areas had not been addressed in the Electricity Industry Participation Code within a year, identifying the matters that had not been addressed, explaining why this was the case, and setting out when and how the Authority proposed to provide for those matters.

8.4.6 These mechanisms ensured the timely delivery of priority reform.

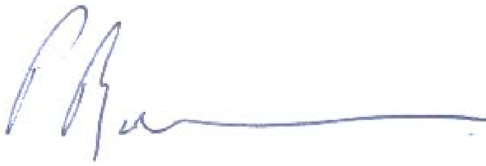
## 8.5 Address other vertical integration issues

8.5.1 While structural separation of Chorus and the open access obligations of the LFCs go a long way to solving prior market failure and challenges (e.g. around vertical integration), many of the same challenges still exist. There is still a need for a regulatory framework to manage other issues arising out of vertical integration. For example, there are issues as to:

a) RBI, where Vodafone is a vertically-integrated operator with obligations to provide services to its competitors. Vodafone's deed obligations are proving to be inadequate to deal with the problems that are arising;

b) Demand for mobile data is forecast to increase rapidly, and consumer expectations for a mobile experience will be increasingly interchangeable with those of fixed line. Ensuring vibrant competition and innovation for the benefit of end users within the mobile retail market will be key to ensuring consumer expectations are met. While this is identified in the Options Paper, we do not believe it is given adequate weight.

Regards,



**PAUL BACON**
**HEAD OF MARKETS**

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## Appendix A Responses to consultation questions

| Question | Response |
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| **The role of input methodologies** | |
| 1. Please comment on the set of matters that you recommend input methodologies should cover, with reference to the examples above. | 1.1 We think that the input methodologies should cover all the rules needed to provide certainty to both the regulated supplier and the access seeker about the core components of the BBM. We think there is value in leveraging off the lessons learned in the electricity sector so the list of input methodologies in the Options Paper seems to be a reasonable starting point.<br>1.2 We agree with MBIEs proposal to require input methodologies for network and service quality matters.<br>1.3 We also believe that Chorus and LFCs should be subject to a network upgrade and capital expenditure approval regime, outlined in an input methodology similar to Transpower's Capex IM. |
| **The role of information disclosure** | |
| 2. Should information disclosure apply even if price-quality regulation is applied to Chorus and/or LFCs at 2020? | 2.1 Yes. We remain of the view that information disclosure should apply to both Chorus and LFCs. The Commission should be required to prioritise subsequent summary and analysis of this information, as well as be required to maintain a public database, allowing public access to the information in an easily accessible format. |
| 3. Should the information disclosure requirements apply to Chorus' copper services? Should there be any differences in the information required for the copper network? | 3.1 Yes. We think that information disclosure is important to provide confidence that the purposes of regulation are met and this applies to the copper as well as fibre networks.<br>3.2 We believe that Chorus should provide a timeline of upgrades to the copper network, as well as information on the assets that are shared between Chorus' copper and fibre assets. This is particularly important in areas where Chorus' assets are excluded from the RAB (if this occurs). |

| Telecommunications Commissioner role | | |
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| 4. Do you agree that the role of the Telecommunications Commissioner should be reviewed after 2020? | 4.1 | We believe that the Telecommunications Commissioner's role should be retained, and that it should include increased market facilitation powers. In our submission, and Castalia's report, we provide examples of the how this occurs in the electricity sector. Our preference would be to bring forward any review and expand the powers of the Telecommunications Commissioner to protect and safeguard the competitive process, particularly in relation to network access issues. |
| | 4.2 | We refer to sections 6.3, and 8.2 for more information. |
| **Revenue cap and number of RABs** | | |
| 5. Do you agree that the number of RABs for price-quality regulation purposes should be set in legislation, or should it be a matter for the Commission? | 5.1 | We believe that the number of RABs should be set by legislation. There are unique issues facing the telecommunications sector in relation to the operation of parallel copper and fibre networks and the long term migration to fibre, in most regions, which require a policy response. |
| 6. Do you support a single RAB for copper and fibre? Please explain how your preferred approach would meet our policy objectives. | 6.1 | We support a single RAB. This is consistent with a technology neutral approach and will enable the regulator to ensure that RSPs do not pay twice for the same service. It will also avoid arbitrary and inefficient cost allocations exercises in a merged business. |
| **RAB valuation methodology** | | |
| 7. Do you agree that decisions on the RAB valuation methodology should be made by the Commission? | 7.1 | Yes. We think this is a technical decision which requires a sound consultation process. This is fully within the Commerce Commission's expertise. |
| 8. If you think the Government should provide legislative guidance, what form of guidance do you recommend? | 8.1 | We think that it is appropriate for the Government to provide high level guidance to the Commission on this topic, including a desire to avoid price shocks. We do not support the use of a line in the sand approach, using the TSLRIC asset base for a BBM regulatory model. |

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| | 8.2 | We believe that the fundamental difference in approach between TSLRIC and BBM, and the reasons for that change, should be also provided to the Commission as guidance in selecting an appropriate RAB valuation methodology. This would enable the Commission to make the decision on the best approach that reflects the change in methodology, taking into account the information available to them. |
| **Other decisions for the Commission** | | |
| 9. Do you agree with our proposed approach to enable the Commission to determine the scope and treatment of assets in the RAB? | 9.1 | Yes. |
| 10. Please comment on any matters Government should take into account when developing a definition of "fixed line access services". | 10.1 | Fundamentally the focus should be on the natural monopoly characteristic of the service. This is the justification for the expectation of a guaranteed return of capital. We are troubled by the current interpretation of lines functions services applied by the Commerce Commission (see Castalia report). We note there may need to be a mechanism in the Act for the definition of "fixed lines access services" to be adjusted as the market environment changes. |
| 11. Do you think Chorus' assets in LFC areas should be excluded from its RAB? | 11.1 | No. We believe all of Chorus' assets should be included in the RAB and that there needs to be an approval process for further investment in copper services, particularly in LFC areas where there is already a provider of regulated anchor products. |
| 12. Do you agree the Commission should decide on the treatment of UFB financial support? Do you support the Government providing guidance? If so, please comment on the guidance or approach you recommend. | 12.1 | Yes. There may be value in the Commission receiving formal guidance from the Government as to the current state of affairs. The network companies should be entitled to rely on the compact they have with Government in relation to the infrastructure build they have undertaken in response to the government's request, and to not have that compact overturned by a change in regulation. |
| 13. Please comment on our proposed approach to provide guidance to the Commission that it should implement its | 13.1 | We agree that there should not be incentives for Chorus to prolong the life of the copper network and understand that once the value of this network is set, Chorus should be entitled to recover that value |

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| functions in a way that does not create incentives on Chorus to keep end-users on copper services in areas where there is a choice of UFB services available. | and no more. We expect that copper-fibre migration trends will form an integral part of assessing that value.<br>13.2 We believe that Chorus should be required to seek approval from the Commission before further investing in its copper network. Such investment should not be approved in areas where there are UFB services (or other services, such as fixed wireless, with open and non-discriminatory access) available, or where deploying an alternative regulated service would be more efficient. |
| 14. Do you agree the Commission should decide on the treatment of UFB initial losses? | 14.1 Yes. We are happy for the Commission to decide how initial losses are to be taken into account when allowing regulated suppliers to return normal returns over the lifetime of their investments. |
| **Assessing the efficiency and prudency of capital expenditure** | |
| 15. Do you agree with our proposed approach to the treatment of networks rolled out under the Government's UFB and RBI programmes? | 15.1 We agree that there is a role for government to provide advice about the prudency and efficiency of past expenditure as it led the tender contracting process for the design and build of the UFB network and it would be unreasonable to change the goalposts after the build. However, we see this as a transitional measure only. Looking forward, we agree that the Commerce Commission should design and administer the rules to ensure future capex is prudent and efficient. |
| 16. Do you agree with our proposed approach to the treatment of non-standard installations? What threshold do you propose for charging end-users for non-standard installations? | 16.1 We agree there should be an "exacerbator pays" connection charge for non-standard installations. |
| 17. Do you agree there should be a pre-approval mechanism available to regulated suppliers for future major capital expenditure based on the Transpower model? | 17.1 Yes. The Transpower model is now well understood and tested. However, we believe that there needs to be thorough consultation on how it will be implemented for telecommunications regulated suppliers, particularly future major capital expenditure in Chorus' copper network.<br>17.2 As stated above, we believe that it is particularly important to require Chorus to seek approval from the Commission before further investing in its copper network. Such investment should not be approved in areas where there are UFB services (or other services, such as fixed wireless, with open and non- |

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| | | discriminatory access) available, or where deploying an alternative regulated service would be more efficient. |
| 18. Does the proposal to require the Commission to have regard to economic policy statements provide sufficient certainty to support any future government broadband infrastructure initiatives? | 18.1 | Yes. We think there are a number of matters which are difficult to hard wire into the legislation and the policy statements provides a suitable vehicle for future directions from the government as regulatory settings need to be updated to take into account changing market circumstances. |
| **Form of price-quality regulation** | | |
| 19. What is your preferred option for the form of price-quality regulation – price caps, a revenue cap, or our preferred option – and why? | 19.1 | We agree with a revenue cap and anchor product approach, provided the anchor products reflect products that end users want. |
| | 19.2 | Our primary concern with this approach is that the anchor products should not become the poor cousins of the commercial services. We believe that the Commission will be best placed to determine the appropriate role of anchor products in the market, to establish their specifications, and to decide their prices within the revenue cap accordingly. The Commission is currently working through its s30R review of the current UBA Standard Terms Determination, focusing on the service requirements of the current UBA service. It will be able to apply this learning and thinking to setting the anchor products. |
| 20. How could your preferred option be implemented to manage the risks identified above? | 20.1 | See above. |
| 21. If you prefer a price cap approach, how should the demand forecasting risk be managed? | 21.1 | Not applicable. |
| 22. Is there any way to make sure that the UFB provider is not wholly insulated from competition under a revenue cap model? | 22.1 | We agree with an asymmetric wash up. We think that regulated suppliers as well as consumers should bear some of the risks associated with competition and technology changes and not be fully insulated from these events. |

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| For example, could an asymmetric wash up be applied? | 22.2 Chorus and LFCs will be best placed to respond to market demands through negotiating commercial services with access seekers, so should bear the risk of recovering up to the revenue cap. This would also reduce the ability for Chorus to game this construct by discounting copper commercial services with the intention of undercutting UFB providers, knowing that it will recover the difference in the wash up. |
| 23. Are there any risks or benefits of Option 3 that we have not identified? Will this option have the incentive effects we are seeking? How could these be addressed? | 23.1 No comment. |
| 24. Do you agree the impact of competition 'at the fringes' should be managed? If so do you agree with our proposal for an 'asymmetrical wash up'? | 24.1 Yes, and yes. |
| **Anchor products** | |
| 25. Should the following services (as defined above) be anchor products from 2020? Why or why not?<br>a. voice-only service;<br>b. entry-level broadband'; and<br>c. 'basic broadband'. | 25.1 We believe that the Commission should determine the appropriate role of anchor products in the market with respect to commercial services, and establish their specifications and prices. Anchor products should be set and reset by the Commission through a consultative process, possibly including the use of regulator-convened advisory groups.<br>25.2 We do not believe that MBIE should define the set of anchor products. But rather the high-level approach of a revenue cap, with price caps for anchor services. The detail should be left to the Commission. |
| **Pricing of anchor products** | |
| 26. How should anchor product prices be determined? | 26.1 Anchor products should be set by the Commission through a consultative process, possibly including the use of regulator-convened advisory groups. |

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| 27. Do you have any comments on the following principles?<br>a. end-users should not face sharp price increases;<br>b. prices in the initial regulatory period should be set with regard to 2019 prices; and<br>c. anchor product prices should be broadly reflective of the quality of the particular anchor product. | 27.1 We agree with these principles. We would also like to see principles for the commercial services. |
| 28. Are there any other matters that need to be addressed regarding the pricing of technology-neutral anchor products? | 28.1 No comment. |
| 29. Do you think there would be any negative outcomes from the requirement to provide anchor products on a geographically averaged basis? Do you think the Commerce Act provisions would be a sufficient alternative in the absence of this requirement? | 29.1 No comment. |
| **Layer 1 anchor product** | |
| 30. Should the following services be anchor products from 2020? Why or why not?<br>a. layer 1 fibre service; and<br>b. any other services. | 30.1 We agree there should be the flexibility in the legislation for the Commission to introduce a layer 1 fibre product if this is cost effective and there is evidence that the UFB providers are not meeting RSP needs with layer 2 level products.<br>30.2 However, we suspect sound regulation of layer 2 will mean that this product may not be required. |
| 31. What test should the Commission be required to apply to determine whether | 31.1 See paragraph 30.1 above. |

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| to introduce a layer 1 fibre anchor product? | |
| 32. Would there be any problems with a technology-specific layer 1 anchor product? Should the layer 1 anchor product include UCLL, and therefore be technology-neutral? | 32.1 As we understand there has been limited uptake of the current UCLL product, we do not think this product needs to be included in the initial set of offerings. The regime needs to be forward looking and, as noted in our main submission, we do not think that there should be any incentives to further invest in the copper network. |
| 33. Should the layer 1 anchor product include both point-to-point and point-to-multipoint configurations? How do you recommend the Commission should calculate a cost-oriented price for the layer 1 anchor product? | 33.1 No comment. |
| 34. Should the Commission have the power to require services based other forms of unbundling (such as wavelength unbundling) to be provided? | 34.1 No comment. |
| **Updating anchor products** | |
| 35. How should the regulatory framework provide flexibility for the Commission to update anchor products over time? What criteria should be used for the selection of anchor product specifications? | 35.1 We agree there should be formal processes for updating the anchor product set led by the Commission. We also recommend that advisory groups are involved in this task as well. |
| 36. Should there be a limit on when the Commission can review and update the anchor product set? What frequency of reviews do you recommend? | 36.1 The anchor product set should be reviewed and updated at least every regulatory period. It is possible that the broadband products may need to be updated more frequently, e.g. every three years, than the voice only services. Accordingly, we suggest that there is some flexibility afforded to the Commission to review the anchor products within the regulatory period, where necessary. However, care will be needed |

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| | to ensure that the any mid-regulatory processes do not undermine Chorus' management of its commercial services within its revenue cap, especially if there is a 12 month notice period for changes to these commercial services. |
| 37. Should there be a limit on the number and type of anchor products, as proposed? | 37.1 The Commission should have the power to determine the number and type of anchor products following a consultation process.<br>37.2 There needs to be a mechanism to add to the list following a market review if the purposes of providing flexibility to the network owners result in unintended, and competitively harmful consequences. |
| **Consistency between Chorus and LFCs** | |
| 38. Do you think that anchor products should be priced consistently across LFCs and Chorus? | 38.1 We would prefer that the anchor products were priced consistently across LFCs and Chorus. However, we believe that both LFCs and Chorus should be subject to price-quality regulation, where each can expect a return of and on capital. The cost of each of the networks are different, and so we understand that consistent pricing of anchor products may result in different prices. |
| 39. Please comment on any alternative ways to achieve consistency of pricing between Chorus and LFCs. | 39.1 No comment. |
| **Commercial services** | |
| 40. Should commercial services offered by UFB providers be subject to any requirements? | 40.1 Yes. |
| 41. Do you agree with our suggested requirements, including geographic averaging (noting the question earlier on this point in relation to anchor products) and the requirement that 12 months' | 41.1 Yes. We believe that commercial services should have geographically averaged prices, and be subject to open and non-discriminatory access obligations. We believe that the 12 month notice period should apply to price increases, contentious changes to non-price terms, and service withdrawals. Where there is a price decrease, or changes that are unanimously sought by industry, these should not be subject to the 12 month notice period requirement. |

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| notice must be given of any changes to price or material non-price terms for commercial services? | 41.2 We also agree with MBIEs proposal that UFB providers be subject to a commitment to ongoing service development and RSP engagement, whereby they are required to publish a roadmap of future product development. However, we note that this might provide alternative service providers, such as with fixed-wireless, the advantage of having access to a competitor's strategic information.<br><br>41.3 The anchor product and commercial services construct allows for RSP negotiations with Chorus to develop commercial services that cater to industry needs. Where there are differences in opinion as to what those services should look like, we are concerned that smaller players will have less negotiating power. Accordingly, we believe the Commission should have powers to oversee these negotiations. |
| **Deeds of undertaking for open access** | |
| 42. What is your view on our proposal to carve the initial layer 2 anchor products out from this obligation? | 42.1 No comment. |
| **Retaining flexibility as the market matures: the Commission can recommend changes to the form of control** | |
| 43. Do you agree the Commission should have the power to recommend changes to the form of price control (including moving to a price cap regime) if certain criteria are satisfied? If so what criteria would you propose? | 43.1 Yes. We believe that the Commission should have power to recommend changes to the form of price control if there is evidence that the revenue cap, and anchor product price caps have resulted in unintended consequences, such as creating a barrier to entry for new entrants. |
| 44. Should the Minister make the final decision, or should this matter be delegated entirely to the Commission? | 44.1 We believe that this is ultimately a policy decision, and that the Minister should make the final decision based on the Commission's recommendations. |
| **Setting price and non-price terms** | |

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| 45. Do you agree that regulated terms should be set by Commission determination? | 45.1 | Yes, we believe that core regulated price and non-price terms should be set by the Commission in a determination following a consultative process, possibly involving the use of advisory groups. These should replace the Standard Terms Determinations (STDs). |
| | 45.2 | Wherever practicable, non-contentious terms should be in codes developed by the network provider, following industry consultation, and then approved by the regulator. |
| 46. If so, do you agree that mirroring the approach to section 52P determinations in the Commerce Act is appropriate? | 46.1 | We believe that this is appropriate, and will be important to maintain consistency with the Part 4 approach, rather than tacking bits of different approaches together. |
| **Options for implementing price-quality regulation: Chorus** | | |
| 47. Do you support implementing price regulation for Chorus at 2020, or as a backstop? | 47.1 | We support implementing price regulation for Chorus at 2020. We believe that a backstop approach would be an ineffective constraint on Chorus' monopoly power. |
| 48. What benefits would a backstop approach have over a 2020 model of the type described in this paper? | 48.1 | We see no benefits. |
| 49. How could a backstop approach ensure that the interests of end-users are taken into account? | 49.1 | We do not believe that it could. |
| 50. Under a backstop approach, how do you suggest copper services be treated? Please comment on the preferred option of 'freezing' the copper price. | 50.1 | We do not support a backstop approach. However, if such an approach was implemented for Chorus' fibre services, we believe that a building blocks methodology should be applied to the copper services, rather than 'freezing' the current price. This would ensure consistency if fibre was subject to price-quality regulation in the future. |
| 51. Under this option, how do you propose managing the risk of copper prices | 51.1 | As above, we do not support this option. |

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| becoming out of date over time? Is a CPI-1% adjustment appropriate? | |
| **Options for implementing price-quality regulation: LFCs** | |
| 52. Is there a case to implement a backstop model, with information disclosure, for LFCs?<br>a. To what extent do you think LFCs will be subject to competitive pressure from 2020?<br>b. Do you expect that they will need to be subject to price-quality regulation at some point? When might this occur?<br>c. Are there any other risks or benefits to a lighter touch approach for LFCs? | 52.1 No. We believe that there will be limited competitive pressure on LFCs from 2020, and believe that they should be subject to price-quality regulation from 2020.<br>52.2 We expect that LFCs will need to be subject to price regulation at some point in the future, when copper no longer acts a competitive constraint. We anticipate that this will occur soon after 2020. Fibre uptake is increasingly steadily, and will only continue to grow as more consumers demand faster speeds.<br>52.3 Because we believe that LFCs will ultimately need to be price regulated, we are of the view that having an interim period where a backstop only regime applies is unnecessary, and creates uncertainty. It would be pragmatic to implement price-quality regulation from 2020, rather than inefficiently require an intervention investigation process. |
| **Intervention test** | |
| 53. Please comment on the proposed intervention test based on the purpose statement.<br>a. What are the risks and benefits?<br>b. Would another type of test be more appropriate, such as that in section 52G of the Commerce Act? Why? | 53.1 No comment. |
| **Legislative vehicle – Telecommunications Act** | |
| 54. Do you have any comments on our proposal to establish the fixed line | 54.1 We agree that this is appropriate. |

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| regulatory settings within the Telecommunications Act? | |
| **Purpose statement** | |
| 55. Do you agree that it is most appropriate to set out a new purpose statement separately to the existing one, in a new Part to the Telecommunications Act? | 55.1 We agree that the price-quality regulation of structurally separated networks will require a purpose statement such as s52A. The focus of the purpose statement in s52A is to balance the interests of investors and consumers, however it overlooks the needs of the competitive parts of the market for access to critical infrastructure. As we noted in our submission, this does not address the interests of the rest of the supply chain. |
| 56. Do you agree with our proposal to largely replicate section 52A? Will this achieve the outcomes we have outlined?<br>a. Do you agree with the terminology, including the use of "end-users"?<br>b. Do you think a single purpose statement derived from section 52A will be adequate to deal with access issues associated with unbundling?<br>c. Are any other definitions needed? | 56.1 See above. |
| **Adding and removing suppliers** | |
| 57. Do you agree with our proposed process and test for introducing a new supplier to the regime (or removing a supplier from the regime)? Please provide additional comments on any other aspects you think should be considered. | 57.1 MBIE has determined that providers of fixed line access services are monopoly service providers, and accordingly should be price-quality regulated. Thus, we believe that the definition of "fixed line access services", and a declaration by the Government that a business is a fixed line access service provider, would provide for the introduction of new suppliers.<br>57.2 As we noted above, there may need to be a mechanism in the Act for the definition of "fixed lines access services" to be adjusted as the market environment changes. |

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| 58. Do you agree that the new framework should only apply to fixed line services? | 58.1 No. We believe that utilities style regulation might be appropriate for future monopoly services, such as fixed wireless services that may be deployed at the fringes of the network. |
| **Appeal rights** | |
| 59. Do you agree with the proposed approach to merits review? If not, are there any characteristics of fixed line services which mean that Part 4 merits review processes are inappropriate, or any changes are needed? | 59.1 Yes. |
| 60. Do you agree that merits review should not be introduced for the existing regulatory framework in the Telecommunications Act? | 60.1 We believe that merits review should be introduced for future decisions made under the existing framework. |
| **Backdating and claw-backs** | |
| 61. Do you agree that mandatory claw-backs should be introduced for utility-style regulation of fixed line services under the Telecommunications Act? | 61.1 Yes. |
| **Managing the transition** | |
| 62. In your view, do our proposals around smoothing the revenue cap and minimising price volatility for anchor products provide enough protection in reducing the risk of price and/or revenue shocks? | 62.1 Yes.<br>62.2 We agree that price volatility should be minimised during the transition between regimes. We agree with MBIE's proposed solution of providing explicit policy objectives to the Commission to minimise revenue volatility, as well as smoothing any price increases for anchor products. |

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| | 62.3 We believe that if the Commission smooths the revenue cap for regulated suppliers, that the price volatility of anchor products would also likely be reduced. However, MBIE's proposed solution removes all doubt.<br><br>62.4 We note, however, that there seems to be an underlying assumption that the revenue and price caps will increase from those in the market today. We do not believe that this should be assumed. |
| **Transitional arrangements** | |
| 63. Do you agree that a transitional arrangement should be in place in case the new framework is not able to be implemented with enough notice before 2020? | 63.1 Yes. |
| 64. Do you agree with the proposed model of a temporary freeze? Are there any other risks or benefits of this approach? | 64.1 Yes. We agree with MBIEs comments in this regard. It would reduce the uncertainty around moving to a different interim regime, and would reduce the amount of change for the industry. |
| **Mobile competition and infrastructure sharing** | |
| 65. Please comment on any other measures you recommend to address mobile infrastructure sharing (outside of changes to Schedule 3, which are discussed in the next chapter). | 65.1 We previously submitted that the Telecommunications Commissioner should take a more hands-on approach to promote competition in retail markets, similar to the role of the EA in the electricity sector. However, MBIE considers that "the Commission has the tools to address the most significant issues that give rise to anticompetitive conduct in telecommunications markets."[25] We respectfully disagree.<br><br>65.2 New entrants face tremendous barriers entering the mobile market. The options are to either role out their own network, which is prohibitively costly and inefficient, or enter into prolonged negotiations with suppliers. Only at this point would a new entrant be equipped with evidence to support a request that the Commission commence a Schedule 3 investigation, which would be onerous, costly, and lengthy. |

[25] MBIE, "Telecommunications Act Review: Options Paper", July 2016, p 83.

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| | 65.3 | The Telecommunications Commissioner should have the responsibility of more actively monitoring the telecommunications environment, and removing or reducing barriers to entry. We believe that the Telecommunications Commission will need an enhanced toolkit in order to undertake this task. |
| | 65.4 | We believe that a further options paper should outline some alternatives to the status quo, and seek submissions on these. |
| **Other issues for mobile regulation** | | |
| 66. Do you agree with our views on MVNOs and tools to manage competition in retail markets? | 66.1 | No. We believe that this is an area that warrants further attention from MBIE, and we believe that MBIE should consider publishing a further issues paper in this regard. |
| **Managing copper to fibre migration** | | |
| 67. Would a regulated code, applying to RSPs as well as UFB providers, be the best way to protect end-users in the transition from copper to UFB services? | 67.1 | We agree with the views in the TCF submission on this point. We emphasise the need to protect consumers through this transition. |
| 68. If a regulated code is not your preference, what mechanism do you propose to ensure end-users are protected in the transition? | 68.1 | No comment. |
| **Recommending regulation and deregulation** | | |
| 69. Do you agree with the recommendations to make the Schedule 3 process more efficient? | 69.1 | We agree with some of the recommendations. |
| | 69.2 | MBIE has recommended three changes to streamline the Schedule 3 process, as well as one change to mitigate the risk of harm during a Schedule 3 process. We discuss each of these in turn below. |

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| | 69.3 Firstly, MBIE recommends that that the requirement in section 4(1) of Part 1 of Schedule 3 for the Commission to make 'reasonable efforts' to prepare and deliver its final report to the Minister no later than 120 working days after public notice is given at the start of the process to be changed to a 'hard' deadline.<br>69.4 We do not believe a creating a 'hard' deadline would assist in streamlining the processes, especially where the issue is a contentious one, or is not clear-cut and requires significant investigation. Situations where additional time is required by the Commission should be allowed for.<br>69.5 Secondly, MBIE recommends streamlining the Commission's process for carrying out investigations into changing a 'specified' service to a 'designated' service under Part 2 of Schedule 3. MBIE is of the view that "changing how a regulated service is regulated is more of a technical matter that does not require the same level of investigation and scrutiny as investigating the introduction of regulation."26 We agree, and believe that this change should be legislated.<br>69.6 Thirdly, MBIE recommends changing the process under Schedule 3A for undertakings to include a requirement that an access provider is only able to have one attempt at providing an undertaking to the Commission in lieu of regulation being imposed. We agree, and again believe that this change should be legislated.<br>69.7 Finally, MBIE proposes that the Commission should have the power to set an interim price for a potentially regulated designated service that applies during a Schedule 3 investigation. Some form of wash up would be necessary after the investigation. We do not believe this would be appropriate. Interim prices create unnecessary uncertainty and complexity for the industry. We also believe that this goes against best regulatory practice, as it is effectively price-regulating a service prior to deciding that the service should be regulated. This undermines the notion that the regulator has an open mind by assuming a certain outcome. |
| 70. Please comment on whether any other aspects of the Schedule 3 process could be removed or shortened further, or on | 70.1 We believe final minister approval could be removed. |

[26] Options Paper pg 89.

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| any other ways to make the process more efficient and timely. | |
| 71. Do you recommend any further changes in order to mitigate any potential harm being done in the market while a Schedule 3 process is underway? | 71.1 See sections 3 and 8, discussing the relevant market rules that promote efficiency and competition in the electricity sector. We believe these should be included in the telecommunications regulatory regime. |
| 72. Should there be criteria specified for the Commission's decision whether to recommend a one- or two-stage pricing process for a potentially regulated service? | 72.1 No comment. |
| **Convergence: Broadcasting exemption and net neutrality** | |
| 73. Do you agree that the current regulatory framework has sufficient safeguards in place to manage any net neutrality issues that may arise, in light of recent market developments? | 73.1 No. We believe that there should be a code established that governs transparency of net neutrality. |
| **Customer service and quality for telecommunications services** | |
| 74. Please comment on the proposal to amend the Consumer Complaints Code and Scheme TOR to make wholesalers primary respondents to a customer complaint. | 74.1 We agree with the views in the TCF submission on this point. |
| 75. Please comment on the alternative option of introducing a new consumer complaints resolution scheme. | 75.1 We agree with the views in the TCF submission on this point. |

| Housekeeping in the Telecommunications Act | |
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| 76. Are there any other areas of the Telecommunications Act that you consider need to be updated or removed to be fit for purpose? | 76.1 Yes. See sections 3 and 8 of our submission. |