

Submission by the Telecommunications Carriers' Forum on the Telecommunications (TSO, Broadband and Other Matters) Amendment Bill

Introduction

1. This submission is made by the Telecommunications Carriers' Forum (TCF) and is supported by its members BayCity Communications Limited, CallPlus Limited, Compass Communications Limited, Enable Networks Limited, FX Networks Limited, Kordia Limited, Northpower Limited, Telecom New Zealand Limited, TelstraClear Limited, Vodafone New Zealand Limited, Woosh Wireless Limited, WorldxChange Limited, Vector Communications Limited.
2. The TCF appreciates the opportunity to comment on the Telecommunications (TSO, Broadband, and Other Matters) Amendment Bill (**Bill**). We also recognise the importance of sufficient time to comment on draft legislation and note that whilst we have had 10 weeks to consider the Bill as originally proposed, only seventeen days were provided to consider the Supplementary Order Paper.
3. We would like to appear before the Select Committee in support of our submission.
4. This submission focuses on provisions that provide for TSO reform and introduction of the new \$300M Telecommunications Development Levy (TDL) (Part 1 of the Bill which amends Part 3 of the Telecommunications Act 2001 (**Act**)).

Summary

5. We support the Government's objective of extending fast broadband to rural consumers. The economics of providing broadband services to rural customers are challenging for private investors and Government support for investment is welcomed. There are significant economic and social benefits to increased coverage of fast broadband services. For good public policy and efficient taxation principles reasons, these objectives should be funded by general taxation rather than a narrow industry based levy.
6. Nonetheless, we appreciate that the Committee is tasked with considering the proposed Levy set out in the Bill. The levy will apply to all industry sales and is a substantial new commitment for both consumers and the industry - \$300M over five years or \$150 per household and business in NZ. It needs to be implemented fairly and transparently.
7. We have made a small number of proposed amendments to improve Part 1 of the Bill - none of which will impact or delay the Government's policy objectives. The proposed amendments are set out in the attachment to this submission. Our key concerns are that, as the Bill is currently drafted:
 - 7.1 The levy will apply retrospectively to sales from July 2010, even though Parliament has yet to consider enabling legislation, the initiatives or services to be funded have yet to be specified and the level of the levy for providers is still uncertain.

As a matter of good public policy and practice, rather than levying ahead of time, it should be aligned with TDL expenditure. In practice, this means from July 2011 (Clause 22(1)) when expenditure is expected to start. The Government has already allocated \$100M to cover any interim funding gap - part of which is to be paid back by the levy once it begins. Aligning the levy with TDL expenditure would not delay delivering RBI outcomes.

- 7.2 The Bill gives the Minister too broad a discretion to apply funds to a wide range of activities (Amended s90) - it's difficult to think of a telecommunications proposal that couldn't meet the criteria set out in the Bill. There are no obligations to consult over specific proposals, provide transparency over how the levy is spent, nor return to consumers and operators any levy not required to deliver new services.

Consultation occurred last year on proposals to fund existing TSOs, the rural broadband initiative and enhancements to the 111 system. This should form the list of permitted activities under an appropriately defined Ministerial discretion. This will not unduly constrain the Government as the Act already provides a process for developing new initiatives (s70 of the Act). There should also be provision made to enable the return of unused funds to levy payers.

- 7.3 The Bill leaves significant uncertainty for firms over their actual liability. We support broadening the levy base to better reflect where the benefits accrue. On this basis, the levy base should include associated revenues from substantive New Zealand based providers of content and information services. We also request greater certainty on how key levy allocation principles are to be applied - such as the treatment of wholesale revenues and application to content delivery or corporate networks.

- 7.4 The proposal leaves outstanding local service TSO issues hanging. For example, the TSO is questioned by technology and market change and the roll out of overlay RBI and UFB networks. The Supplementary Order Paper provides for a TSO review by 2013. That review should be undertaken now and can occur irrespective of the UFB providers chosen.

8. We have also proposed amendments to the mechanism for determining materiality for liable persons, provision for reviewing decisions relating to the TDL and to add some flexibility over how the industry might establish a multi-tenanted building access disputes resolution scheme.

This Bill is a substantial industry commitment that needs to be applied transparently and fairly

9. This submission focuses on the new development levy provided for in Part 1 of the Bill.
10. The general policy note to the Bill outlines the \$300M Rural Broadband Initiative (RBI), of which much will be funded from a new levy to apply to industry sales. That levy is a substantial new commitment for consumers and the industry - \$300M over five years or \$150 per household and business in NZ - and accordingly the levy should be implemented transparently and fairly. Already demands are coming on the industry to make substantial new investment to support UFB services while industry revenues continue to decline - the Commerce Commission reports a slow industry revenue decline in 2010 and IDC forecast further declines of 0.8% over the coming year.¹
11. We support the Government's objective of extending fast broadband to rural consumers. The economics of providing broadband services to rural customers are challenging for private investors and Government support for investment is welcomed.
12. As many commentators note, extending faster broadband in to rural areas benefits the economy and society as a whole. It is expected that the value from this activity will be realised at a national level - through productivity gains, greater connectivity and social cohesion - rather than at a private business level. Given the benefits are broad, in principle the levy should be funded from as broad a tax base as possible. There are strong public policy reasons for funding rural broadband service from broader taxation rather than through a specific industry levy.²
13. In earlier submissions to the Government we recommended more effective and simpler means of achieving these outcomes - including through general taxation or a consumer levy (which would be significantly simpler to apply and capture wider benefits).
14. Having said that, we appreciate that the Committee is considering the levy construct set out in the Bill and that is the focus of our submission. We support broadening the definition of liable persons and the proposed process to collect the levy. Our key concerns relate to the retrospective nature of the levy and the lack of transparency over initiatives and how the funds levies are to be dispersed.

Addressing the retrospective nature of the TDL

15. As the bill is currently drafted, the levy will apply retrospectively to industry sales from July 2010 - even though Parliament has yet to consider enabling legislation, the services to be funded by the levy have yet to be specified or built and there is real uncertainty over how the levy will apply to individual providers.

16. There is no good policy justification for the retrospective application of the levy, and the proposal is questionable in light of key constitutional principles. We are not suggesting that the policy reforms be delayed, but that the new levy should be aligned with TDL expenditure. In practice this means that, the old TSO regime in Subpart 2 of Part 3 of the Act can be repealed as currently proposed by the Bill, and that the new levy should only apply from July 2011 to align with expenditure. The Government has set aside \$100M funding for the initial phase of the RBI - around half of which is to be paid back by the levy over time. Aligning the levy with TDL expenditure in this way addresses concerns relating to the retrospective application of a levy, but will not delay RBI outcomes as funds are already available for the interim period.

A retrospective levy is poor policy

17. Levies are commonly used to fund industry related services. The difficulty is that the Government seeks to collect a fund of \$300 million to spend on rural broadband development, but there are no firm plans or contracts in place to spend that money on specific services for the industry (which is factually the case here). The purpose of the levy is to fund the TDL, however, no TDL costs have been incurred. Under these circumstances, the Government can still meet its legitimate policy objectives, even if the levy were to start from July 2011.
18. Treasury has published guidelines³ which, amongst other things, require charges to relate to the reasonable costs to provide a service. In line with this guidance, the levy should only apply to services that are actually provided to the industry - when costs are known and being incurred. Otherwise, this is just a tax.
19. This is not just turning the handle on the old levy - significant uncertainty remains for the industry. The Commission has yet to interpret the amended legislation in the light of the purpose of the Act and initiatives funded. Further, expecting firms to commit to cashflows on the basis of official's statements, even though no legislative body has debated the issue, raises philosophical and democratic difficulties.

The levy should be aligned with TDL expenditure

20. The levy should be implemented at the same time that costs are incurred providing new rural services. The RBI negotiations have yet to be completed and, in practice, this means that the levy could start from 1 July 2011 when expenditure is expected to start. Aligning the levy with the TDL will resolve any risk of retrospectively applying a levy, while not delaying proposed policy outcomes. The Government has set aside \$100M for the initial stages of the RBI initiative and to provide for any transition period until the TDL comes in to effect. Any minor expenditure can be provided for in the existing Government allocation. If RBI progresses faster than expected, the Government could simply provide further funding from that allocated to UFB (this would be paid back by the levy over time).

Use of TDL funds

21. The Bill confers the Minister significant discretion to disperse the funds to a wide range of activities. The Bill sets out the purposes to which the levy may be put

(s90(1)). However, s90(1) is discretionary and the purposes are sufficiently broad that it is difficult to envisage any telecommunications project that didn't somehow fit the listed criteria.

22. The Minister may use the levy for virtually any initiative without any transparency or consultation over how the initiatives are identified or considered, nor return to consumers and service providers any levy not required to deliver these new services.
23. The TCF accepts that the Government may choose to levy the industry to fund services that may not otherwise be provided by a purely commercial approach. This is industry sourced money for particular telecommunications related public goods. There is an opportunity cost to depriving the industry of use of these funds, in that they will not be able to be used to develop further initiatives that benefit NZ consumers. It is important that the levy is not applied unnecessarily, nor that the industry is levied more than is required to provide the identified services.
24. However, the Bill provides little guidance on the purposes to which the levy can be put - this leaves room for the Minister to "raid the piggy bank". The Bill specifically provides that the Crown can raise revenue from the telecommunications industry for a specific initiative and then never use those funds for their intended purpose. Alternatively, if a project comes under budget and results in surplus funds than the Crown can keep those revenues, even using them in general spending (s90(2)). If the money is not required for the named purposes, it is reasonable that it should be returned to the industry in the proportions that it was received.
25. The Bill should be amended to tighten the scope of initiatives that may be funded by the levy and to provide transparency over how initiatives are selected and funded. This can be achieved through simple amendment to s90(1) of the amended Act:
 - 25.1 To clarify that TDL funds can only be spent on the specific purposes set out in s90(1),
 - 25.2 To require that any funds not applied to agreed initiatives to be returned to the liable persons that incurred them. There should also be the ability to scale back fees listed in Schedule 3B should they prove to be greater than the named purposes require.
 - 25.3 Being clear that the funds may only be applied to TSO charges, the provision of Rural Broadband Initiatives and enhancements to the emergency services calling services (essentially s90(1)(a)-(c) of the Bill). Interested parties were consulted on these specific proposals last year.
26. These proposed changes will not limit the Minister's ability to undertake new proposals. The Minister already has a process in the Act for proposals to considered and funded (s70(c)). The existing process provides for consultation and transparency over how funds are spent.

Defining the firms to be levied

27. The Bill proposes to capture a wider group of people to be levied. While a number of questions remain, the Bill is likely to apply to virtually all firms offering telecommunications services to the public. We support a broad a levy base as this reflects the wide commercial and social benefits of the infrastructure to be funded by the levy.

Further broadening the levy

28. The Bill should go further and broaden the levy base to capture associated revenues. That is, firms that make direct sales by virtue of the funded infrastructure.
29. Its important to recognise that the telecommunications industry is going through fundamental change. The traditional value chain is changing and new business models forming. Where once content and applications were once intrinsically linked to the underlying infrastructure, they can now be provided over a number of different platforms. Accordingly, its important that the Government not favour any particular part of the value chain or platform when applying levies such as the TDL.
30. We recommend that the Bill is amended to include substantive New Zealand based providers of content and information services within the proposed TDL model. We note that media companies are increasingly using broadband infrastructure to provide services to consumers. An even wider perspective should be taken in the future to that set out in the Bill.
31. We accept that it may not be practical to include all firms - say offshore based applications providers - who will reap benefit from funded infrastructure. It is for this reason and simplicity that we proposed a demand side levy as a more efficient means of capturing the wider benefits of the TDL.
32. In the alternative, we recommend that the Commission is expressly required to monitor and report on how better to capture benefits for levy purposes the wider benefits of TDL initiatives.

Removing uncertainty over the application of the liable persons definition

33. The Bill also leaves significant policy questions outstanding with little, if any, guidance for the Commerce Commission on how the levy should be applied. The Commission will be required to make decisions relating to the treatment of wholesale revenues and application to content delivery or corporate networks.
34. The proposed approach leaves significant uncertainty for the industry over sales that will be subject to the levy. These are key policy decisions issues and, given the significant impost on industry, should be set out in the overarching legislation.

The proposal leaves local service TSO policy hanging

35. The proposal leaves outstanding local-service TSO issues hanging, creating significant uncertainty for the industry as a whole. From our initial reading of the Supplementary Order Paper, it appears to provide for a TSO review by 2013. This

review needs to be conducted now, and is necessary irrespective of who the UFB provider is.

36. For instance, the broader TSO framework outlined in the Bill provides for separate voice and broadband policy initiatives. However, Government funded RBI investments - which provide many New Zealand rural households with superior connectivity - brings in to question the continued relevance of the TSO as these networks are built.
37. The TSO model also maintains a distinction that is increasingly less relevant to the technology over which these services are provisioned (including copper, fibre, wireless, or satellite technologies) and ignores increasing competition in the market. Rather than simply 'structurally separate' the obligation, we need to consider how the policy outcomes should be met in today's market.
38. The policy also does not appear to recognise the impact alternative networks have on Telecom's obligations to provide basic phone line services. These obligations could naturally fall away in regions where customers have a network choice, yet this is not appropriately recognised in the TSO obligations nor funding model .
41. The SOP to the Bill envisages a substantive review by 2013. However, this will effectively freeze rural investment for a further three years. TSO related uncertainty means that little, if any, private investment is likely to occur outside the RBI.
42. There is no reason why the review cannot start now, and as an industry we consider it far preferable that we - and end-users - get early certainty and a TSO regime that we can have confidence in sooner rather than later. Such guidance is crucial for an industry facing such significant structural change, particularly where billions of dollars of Crown and private sector funds are being invested in the shadow of uncertainty regarding this policy. As it stands, a three year delay for this review will simply mean three years of further deferral of rural investments. This review should occur irrespective of whether Telecom is one of the Government's UFB partners.

Process related issues

43. The TCF believes a number of amendments can be made to improve the application of the Bill.
44. The Bill proposes in s81 that liable persons with turnover of less than the 'specified turnover' (being \$10m) are excluded from paying the TDL. The liable person must provide the Commission with financial statements as evidence of its turnover. Section 82 also requires operators to provide detailed financial statements to the Commission. The process should be more targeted and focus on reducing compliance costs.

Ensuring the initial threshold screening does not capture non-telecommunication revenues

45. As it stands, the definition of specified turnover could capture telecommunications and non non-telecommunications related turnover. This could unnecessarily capture multi-sector businesses as liable persons even though the telecommunications related turnover may be minimal. We propose that the definition be amended to clarify that only telecommunications turnover is to be captured in the test.

Reviewing the need for financial statements

46. Further, the requirement to provide financial statements also appears onerous. At the extreme, it would require a liable person to submit their entire financial statements to simply provide proof of a sole turnover figure (especially where these statements may include non-telecommunications information).
47. This requirement also worryingly constitutes an excessive form of information disclosure on all liable parties, where there appears to be no limitations on the Commission in using these financial statements for other purposes.
48. This requirement may also be impractical for a firm to comply with if its normal financial statements are not for the year ending June (the normal TSO year), at least without restating its accounts.
49. Instead, the requirement to provide financial statements should be removed as the Commission should be able to rely on Directors' certification of a single turnover figure, as already required by s81(2)(b) and which s82 could be amended to include. The Bill already requires that if Directors knowingly provide false or misleading information or documents that the High Court may impose a penalty¹ in addition to any penalties that may arise under the Companies Act. Further requiring that this turnover figure has been subject to an independent audit could provide greater assurance too.

And remove any implied cross subsidy

50. The proposal to exclude liable persons (s81) with less than \$10m turnover, who would otherwise be liable persons, will in effect be cross subsidised by the larger companies. It would be more appropriate on economic/policy grounds that the government covered their share of costs rather than the rest of the industry. So the more appropriate procedure would be for all liable persons to be identified, their turnover calculated as a % of total industry turnover, and their share of the development levy paid for by Government.

Review of levy decisions

51. The Bill leaves discretion for a number of decisions relating to the levy. This is a significant obligation on the industry and specific firms and should be capable of being reviewed.
52. This proposed wording severely limits the right of liable persons to appeal to the High Court on any substantive matter concerning these levies. Given that there is potentially many millions of dollars in levies that may be payable, it is simply against the principles of natural justice that liable persons should not be able to challenge

the Commission on its application of this legislation. At the very least, retention of this right gives liable persons the confidence to pay these levies, knowing that there is some form of recourse should the Commission get things wrong.

New multi-tenanted building access disputes resolution scheme

53. The Supplementary Order Paper provides for a statutory right of access by fibre to the premises (FTTP) service providers to multi tenanted buildings. FTTP service provider must comply with a regulated Code and be a member of a consumer complaints scheme.
54. Its unclear whether the current consumer complaints scheme, or a separate parallel scheme, would be best placed to provide this service. The existing industry consumer complaints scheme relates to disputes between service providers and their customers. The proposed scheme is likely to be dealing with access related disputes between FTTP service providers and building owners.
55. The industry is keen to provide these services. However, it may be that a separate parallel service is more appropriate for these disputes, if it is cost-effective, efficient and properly linked to the existing consumer complaints scheme. We propose that Part 4B of the Act be consequently amended to clarify that there is flexibility for more than one industry scheme to exist. In all cases, the Minister would effectively approve the final scheme.

For information on any aspect of this submission, please contact:

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¹ See clause 18 of the Bill and ss156A, 156B and 156L of the Act.

Attachment - proposed amendments to the Bill

While improving the Bill, none of our proposed amendments will impact or delay the Government's policy objectives.

Section	Comment	Proposal
Schedule 3Bs22(1)	To remove retrospective application of levy to past industry sales and align to actual TDL expenditure.	Amend Schedule 3B to make 2011/12 the first financial year for the levy (rather than 2010/11) to align the new levy to expected TDL expenditure. The transition section could then be consequentially amended: 22 Transitional provision concerning liability allocation determination for 2010/11 financial year <i>(1) This section applies in respect of the financial year ended 30 June 20112.</i>
s90(1)	The Bill gives the Minister too broad a discretion to apply funds almost any project without consultation or transparency over how projects are selected and funds dispersed. This wide power is unnecessary as the Act already provides a process for developing new initiatives (s70 of the Act).	Amend to provide specific guidance to the Minister over initiatives to be funded by the levy and provide a process for the return of unused funds to levy payers. 90 Crown use of amounts paid by liable persons <i>(1) The amounts paid by liable persons under section 89 must be used for one or more of may be used for the following purposes:</i> <i>(a) to pay TSO charges;</i> <i>(b) to pay for the Rural Broadband Initiative non-urban telecommunications infrastructure development;</i> <i>(c) to pay for upgrades to the emergency service calling system;</i> <i>(d) any other purpose that the Minister considers will either</i> <i>(i) promote competition in telecommunications markets for the long term benefit of end-users of telecommunications services within New Zealand; or</i> <i>(ii) facilitate the supply of certain telecommunications services to groups of end-users within New Zealand to whom those telecommunications services may not otherwise be supplied on a commercial basis or at a price that is considered by the Minister to be affordable to those groups of end-users.</i> <i>(2) To avoid doubt, except as provided in section 94J, nothing in this section requires the Crown—</i> <i>(a) to use any amount paid by liable persons under section 89 within any</i>

Section	Comment	Proposal
		<p style="text-align: center;">particular time; or (b) — to refund any amount or part of an amount to a liable person if the Crown uses it for a purpose other than a purpose referred to in subsection (1).</p> <p>Insert new section to clarify that:</p> <ul style="list-style-type: none"> - Any amounts paid under section 89 that remain unspent by the end of the following year shall be refunded to liable persons in proportion to the liable persons contribution to the telecommunications development levy specified in Schedule 3B; and - Whether the funding is for a new TSO instrument or otherwise, the Minister must apply section 70(3).
Subpart 2 of Part 3 of the Act	<p>The narrow proposed levy base does not reflect where the benefits accrue.</p> <p>The lack of legislative principles relating to how the levy should apply leaves real uncertainty for the industry.</p>	<p>Amend subpart 2 to:</p> <ul style="list-style-type: none"> - Provide for the levy to apply by way of a demand side consumer levy to better capture the wide range of benefits of the TDL; or in the alternative - Insert principles to be used by the Commission in defining liable persons and revenues for the purposes of the levy; and - Require the Commission to monitor and report on how better to capture, for levy purposes, the wider benefits of TDL initiatives.
17A inserted by the SOP	The proposal leaves local service TSO issues hanging, creating significant uncertainty for the industry as a whole.	The Bill already provides for a TSO review by 2013, this review should occur now and can happen irrespective of whether Telecom is selected as one of the Government UFB partners.
Subpart 2 of Part 3 of the Act	The process for requesting information from liable persons	Amend subpart 2 to better target information requests and focus on reducing compliance costs, fund any implied cross subsidy through Government funding and provide for review by:

Section	Comment	Proposal
	<p>appears onerous.</p> <p>The threshold test used to identify firms who avoid paying the levy is an implied cross subsidy that is best funded by the Government.</p> <p>There is little, if any, ability for liable persons to seek review of decisions.</p>	<ul style="list-style-type: none"> - Ensuring the definition of specified turnover used to assess whether an operator meets the threshold level only captures telecommunications related revenues; - Relying more on Directors' certification for the purposes of s81 and 82 rather than the provision of detailed financial statements. We recommend deleting 81(2)(a) and s82(a); - Providing for the Commission to assess the proportion of levy revenues foregone by the implementation of the s81 threshold, and for this otherwise foregone levy to be funded by the Government; and - Providing for liable persons to appeal to the High Court on any substantive matter concerning the levies.
Part 4B	We would like the flexibility to use either the existing industry consumer disputes service, or a new specialist service, for resolving access disputes between FTTP service providers and building owners.	Amend s156T to clarify that it may be acceptable to the Minister for there to be more than one industry based complaints resolution system.

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- ¹ see IDC media release 10 Jan 2011
<http://www.idc.com/about/viewpressrelease.jsp?containerId=prNZ22648911>
and
see Commerce Commission market monitoring report 2010
<http://www.comcom.govt.nz/assets/Telecommunications/Market-Monitoring/2009-Annual-Telecommunications-Monitoring-Report-amended-6-May-2010.PDF>
- ² CEG, Reforming Universal Service Policy, A report for GSM Europe,
http://www.gsmworld.com/gsm europe/documents/uso_final_report_0208.pdf
- ³ <http://www.treasury.govt.nz/publications/guidance/planning/charges/charges-dec02.pdf>