



TCF Response to Regulating Communications in the future

Introduction

This submission is in response to the MBIE discussion paper: *Regulating communications for the future – Review of the Telecommunications Act 2001* released in September 2015 (the discussion paper).

The TCF CEO Forum has provided leadership and direction to this submission¹. The TCF believes that this review is an opportunity for the industry to provide leadership to the transition from the current environment to a new regulatory framework for UFB. The industry is proposing to commence a process to identify an industry solution that can be discussed with officials and which, in the context of the MBIE review, might provide an appropriate transition.

The TCF supports the regulatory review and the principles that are set out in the discussion paper. In particular, the TCF encourages the development of a regulatory framework that encourages retail and wholesale competition, rewards innovation and investment, and has predictable and consistent processes.

The roll-out of Ultra-Fast Broadband and 4G LTE networks, and the Rural Broadband Initiative, has underpinned New Zealand's success over the last few years. The demand for data will rise at an exponential rate in the future and the internet of things is fast becoming a reality. This growth in demand requires continued investment. The industry has been investing proportionately more than most other OECD countries. But the industry needs to have flexibility to make its own investment decisions.

The regulatory environment must support and reward innovation and investment at retail, wholesale solutions, and services layers, as well as investment in the infrastructure layer. It is further innovation and investment that will deliver improved economic gains, business productivity, new business opportunities, improvements in healthcare and education delivery, and smarter provision of social and community services.

It is the industry participants that are best suited to make decisions on future investment needs and technology choices. The design of the regulatory framework can assist by being robust and based on good policy principles.

The current regulatory model for UFB is a commercially based with a regulatory backstop. The TCF considers that continuation of the commercial model should not be ruled out, but acknowledges that the regulatory review must continue in tandem.

¹ This submission is not supported by Trustpower.

The commercially contracted prices for UFB end in 2020. Consequently it is a matter of finding a price/performance path for an appropriate product set to continue from then. The product set will involve price and quality dimensions. The TCF is proposing that, in the context of the regulatory review, the wholesalers will separately make proposals to their customers to test alignment on a product set which the industry can then discuss with officials. It is intended that the proposal would provide a transition to a new UFB regulatory regime, and that a regulatory backstop would remain a feature of the regime.

A commercial solution will avoid costly and lengthy regulatory intervention, and provide early price certainty. The TCF acknowledges that it is not clear what form the proposed solution might take and how it might fit into a regulatory environment. This is something that the TCF undertakes to work with officials to identify, if a solution can be found. Meeting and information protocols will be employed for any discussion where this is necessary and appropriate. The TCF will be in a position to advise officials whether a solution is available, early in 2016.

The regulatory review should continue in tandem to industry discussions, and the TCF will work with officials to modify the current regulatory framework.

The TCF agrees that a utility style Regulated Asset Base (RAB) model is appropriate for UFB, and is willing to work with MBIE to identify the design principles of the model.

TCF members have differing views on the regulation of copper based access services and the adequacy of the current TSLRIC pricing methodology. These views will be set out in each member's submission.

Concurrently with the review, Chorus and Spark will prepare a proposal for the industry to consider in relation to the migration from copper to fibre that takes account of their TSO obligations. Any solution that is identified will also be discussed with officials.

TCF Response to specific Discussion Paper Questions

Chapter 1: Goals for this Review

1. Do you have any comments on the Government's:

- a. long-term vision for communications markets; and
- b. regulatory principles?

The TCF agrees with the Government's long term vision and principles for New Zealand's telecommunications markets. An environment that encourages innovation and investment will be essential for the future benefit of New Zealand. This will best be achieved if the principles set out in the discussion paper are followed.

Each of the principles is discussed briefly below:

- *Clear necessity.* The TCF agree that regulation should be imposed only where there is clear need to resolve a market problem. The least amount of regulatory intervention should be imposed on the industry, particularly in markets that can be considered competitive. The industry understands best where investment is required and excessive regulatory intervention will chill this investment.
- *Predictability.* The TCF agrees that predictability is desirable.
- *Proportionality.* Regulation should be proportionate to the expected benefits and potential harm it seeks to mitigate.

- *Transparency and Accountability.* The TCF agrees that the regulator should be held to account for its decisions. There is a balance between the cost and availability of appropriate specialist skills. But overall, there is value from having the ability to question and examine the regulator's decisions.
- *Flexibility, including technology neutrality.* Flexibility is important and the TCF agrees that where possible the industry should have an opportunity to resolve issues itself, including developing non-regulatory solutions. The industry is the expert in its field and able to develop better technical solutions. The Commission regulates by reference to competition in markets and seeks market based solutions. The Act should continue to have a focus on markets as this is a technology neutral approach. The Commission will determine what technology and products are substitutable, and therefore identify the solution it considers best fits the problem.

In addition to the principles suggested in the discussion paper, the TCF would like to add the following:

- *Connecting New Zealand through competitive telecommunications services.* The telecommunications policy environment should promote and enable better connectivity and competitive services for NZ. High quality, resilient, world class competitive telecommunications services and infrastructure, are of national importance for the promotion of social and economic progress in NZ.
- *Reasonable return on efficient investment.* Any new regime should ensure that investors in regulated infrastructure are able to receive a fair return over a reasonable period for efficient investment;
- *Market led solutions.* Any new regime should allow for more market led solutions than the current, including allowing the industry to take the lead on product and price decisions with the regulator in a backstop/monitoring role. The industry knows best where and when to make investments on the basis of consumer demand, and this should be a principle for the future;
- *Mitigate the impact of price change.* At a principled level, the regulatory framework should seek to mitigate the impact of price changes for everyone in the transition to any new framework;
- *Balancing the demand side with the supply side.* A good balance between the availability of reliable, quality broadband services to end-users at affordable prices with the commercially appropriate incentives on service providers to continue to invest and innovate is essential. Price, quality and investment should be considered holistically;
- *Open access.* Open access to fixed line access networks means everyone benefits from network investment. It supports competition and innovation from existing RSPs as well as encourages new entrants, which is good for end-users. It is a feature of the current regulatory environment for access bottlenecks and should continue to be so in the future.
- *Credible and Independent Regulator.* A credible and independent regulator is fundamental to a stable and predictable regulatory environment. This requires that the regulator is delegated clear and appropriate authority to make relevant independent decisions and that it is free to undertake its responsibilities without political intervention.

Chapter 3: Is the regulatory framework fit for purpose? Six key problem areas

2. What is your view on creating an overarching 'Communications Act' to consolidate economic regulation across the communications sector?

It is not clear that amending the existing exception for broadcasting infrastructure in the Telecommunications Act will have a material impact on telecommunications markets. The discussion paper provides little analysis on the potential impact or benefits. Telecommunications infrastructure is increasingly being used by consumers to access content that has previously been distributed over traditional broadcasting infrastructure. Removing the exception is unlikely to have a significant impact on competition in telecommunications markets.

TCF members will be making separate submissions on spectrum allocation processes.

3. Have we identified the main challenges facing communications regulation as we move beyond 2020?

Considerable detail is required to be developed as the regulatory environment is designed for the period post-2020. However, the main regulatory challenges for fixed line access, competition in mobile markets and a range of other subsidiary issues have been identified.

The TCF notes that the process has separated consideration of the TSO and the TDL. These are related topics and it would have been useful to consider how both of these obligations come together in the consideration of the broader regulatory environment.

Chapter 4: Pricing for fixed line access services

4. Do you agree with our policy objectives for the price regulation of fixed line infrastructure?

The TCF agrees that there is going to be continued need for investment in the access networks, as well as the ISP networks and services. For this reason, predictability and incentives to innovate and invest will be important.

The discussion paper appears to want to preserve geographic averaging of wholesale prices. However, this may be difficult to achieve in practice with multiple wholesale providers. At the very least, there should be consistency of non-price terms across the access networks of all fixed line operators.

5. Is it feasible to move to technology neutral service descriptions? How would this work in practice?

Moving to technology neutral service descriptions would be a significant switch away from today's framework and approach. TCF members will make separate submissions on this issue.

6. Do you consider utility-style regulation may now be more appropriate for fixed line communications services? If so, what elements would be most effective?

The TCF agrees that a utility style RAB based model is appropriate for UFB access services, although there is considerable detail that will need to be considered. The TCF considers that the start point for any regulatory design of this detail must be the regulatory principles contained in the discussion paper.

TCF members have differing views on the regulation of copper based access services and the adequacy of the current TSLRIC pricing methodology. These views will be set out in each member's submission.

7. Would maintaining the status quo for UFB services be effective post-2020?

The current regulatory model for UFB is a commercial model with a regulatory backstop. The TCF considers that continuation of the commercial model should not be ruled out, but acknowledges that the regulatory review must continue in tandem.

8. If the Government was to specify the pricing methodology that would eventually apply to UFB services, what methodology would be preferable?

The TCF believes that a utility style RAB based model is appropriate for UFB services, although considerable detail needs to be designed into the model.

9. What is your view on UFB access services being regulated immediately from 1 January 2020, compared to a backstop regime whose application would be triggered by a Commerce Commission recommendation?

The TCF is proposing that the industry identify a solution to apply to UFB services from 2020, with an updated regulatory backstop.

If the industry proposal is not accepted, the regulatory framework will need to be in place and able to be implemented to apply from the expiry of the UFB contracts, or the expiry of regulated prices, in 2020.

10. If the Government were to legislate for the price regulation of UFB services from 1 January 2020, do you have any initial thoughts on the scope of such regulation? Should a different approach be taken in LFC areas?

Whatever approach is taken, it should be consistent for Chorus and the LFCs. At the very least, the non-price terms should be the same.

11. If the Government were to introduce a backstop regime for UFB services, do you have any initial thoughts on:

- a. tailoring the traditional Schedule 3 investigation into whether UFB services should be regulated?*
- b. the need for transitional measures that might apply prior to the possible price regulation of UFB services?*

Schedule 3 sets out the process for the Commission and the Minister to follow where either party considers that changes to the regulated services or conditions might be required. This has not provided certainty so the TCF does not believe it is the appropriate mechanism for deciding whether UFB services should be regulated. Other aspects of the Act would obviously require amendment to provide clarity about what changes are being proposed.

The TCF is proposing that, in the context of the regulatory review, the wholesalers will separately make proposals to their customers to test alignment on a product set which the industry can then discuss with officials. It is intended that the proposal would provide a transition to a new UFB regulatory regime, and that a regulatory backstop would remain a feature of the regime.

12. Is there a case for change to the regulated copper access services pricing methodology? If so, what pricing methodology should apply post-2020?

TCF members have differing views on the regulation of copper based services and the adequacy of the current TSLRIC pricing methodology. These views will be set out in each member's submission.

13. If a BBM pricing methodology were put in place for UFB services, how would that impact the choice of a copper pricing regime? Should consistency be an important consideration?

TCF members have differing views on the regulation of copper based services and the adequacy of the current TSLRIC pricing methodology. These views will be set out in each member's submission.

14. If BBM were introduced for UFB and/or copper services, should this be done under Part 4 of the Commerce Act or through a similar model under the Telecommunications Act? What would be the costs and benefits of each option?

The answer to this question will depend on the final decisions about the form of regulation for UFB and copper based services. Consequently, TCF members have differing views on this issue. These views will be set out in each member's submission.

15. What is the right balance between providing predictability through legislated pricing requirements and ensuring the Commission has flexibility to respond to a changing environment? How might this be achieved?

The answer to this question may depend on the form of regulation for UFB and copper based services. Consequently, TCF members have differing views on this issue. These views will be set out in each member's submission.

16. Please comment on the implementation issues we have identified for moving to BBM for UFB and/or copper access services, including identifying any other material issues that you think would need to be addressed.

The discussion paper correctly sets out that one of the key issues is the starting regulatory valuation of the UFB assets.

There is considerable detail to be considered about the number of asset valuations that are required, how shared and common assets are accounted for and how the copper to fibre migration is taken into account given there are different views on how copper might be considered beyond 2020. This is a level of detail that the industry has not had the opportunity to address, but would be part of the design of any solution.

Chapter 5: Mobile competition and radio spectrum

17. Is the current regulatory framework for mobile services effective? Will it continue to support both coverage and competition objectives in the future?

TCF members have differing views on the regulation of mobile services and the adequacy of the current tools available. These views will be set out in each member's submission.

18. If changes are needed to regulation of mobile services, what should we consider? For example, is it worth actively promoting infrastructure sharing?

As already noted, TCF members have differing views on the efficacy of current mobile regulatory tools.

The regulatory framework should not prevent efficient infrastructure sharing provided sufficient competition safeguards are in place.

19. What are your views on the options for reform in spectrum allocation?

a. How could the overlap between spectrum assignment by government and consideration under the Commerce Act be managed?

b. Should there be any requirements on government to consult or establish objectives for spectrum assignments in legislation?

TCF members have differing views on this issue. These views will be set out in each member's submission.

20. Is an undertakings regime needed to set and enforce spectrum assignment terms and conditions? Where would this sit within the existing legislative framework?

It is not clear what problem is being solved for.

21. Should the Ministry of Business, Innovation and Employment or an independent agency monitor and enforce assignment conditions?

It is not clear what problem is being solved for.

Chapter 6: The regulatory toolkit

22. Is there a need to update the current purpose statement in the Telecommunications Act for the communications access regime? What are your views on the suggested changes?

The discussion paper suggests that wholesale fixed access prices could be regulated using a utility style form of regulation. There are questions about whether the current s. 18 purpose statement is appropriate for utility style regulation. This is a topic that requires further discussion and TCF members will make separate submissions on this point.

23. Are there any other barriers to withdrawal or switch-off of copper services which are not addressed here? For example, are there any services based on the legacy copper network for which a replacement product is required, and is not available in New Zealand?

The barriers to migration that need to be addressed, should be considered as part of this framework review, rather than being done in a piecemeal way. The Telecommunications Act was designed in 2001 and the standard terms determinations were designed and added to the Act in 2006. Neither are set up to contemplate, support or enable copper to fibre migration as the market structure and the fibre to the home investment are substantial changes that have happened since that time.

24. In your view, should Chorus have to meet any requirements to protect consumers prior to withdrawing copper services or switching off the copper network within the UFB footprint?

- a. What requirements should be met?
- b. How should these requirements be given legal effect?

Concurrently with the review, Chorus and Spark will prepare a proposal for the industry to consider in relation to the migration from copper to fibre that takes account of their TSO obligations. Any solution that is identified will also be discussed with officials.

The industry, for example could discuss:

- Certain triggers for giving notice of withdrawal of copper in an area. The trigger could take into account user acceptance of fibre;
- Consultation with third party users of copper (e.g. alarm companies) and testing facilities;
- A process for giving notice.

25. Is there a need for a mandatory codes system for providers of telecommunications services in New Zealand? How would this work in practice?

The TCF codes set out good practice and should be complied with by all providers of telecommunications services in New Zealand. The TCF already has codes of practice in place which are mandatory for its members. These include the Emergency Services Voice Calling Code, the Customer Complaints Code (including the Telecommunications Dispute Resolution Scheme) and the Broadband Product Disclosure Code. These codes of practice provide important protections for consumers and a good level of hygiene for the industry in order to ensure that New Zealand's telecommunications services are world class.

However, while any telecommunications provider can adopt these important codes, only TCF members have done so. That creates a small, but noticeable, class of provider which avoids these good hygiene measures and, with them, comes a category of consumer who misses out on the protections these codes offer. The framework should promote compliance with TCF codes to encourage full participation in this industry led initiative, including mandatory compliance with mandatory codes.

26. Do you think there are current net neutrality issues in New Zealand?

The TCF considers that 'net neutrality' is not an issue in New Zealand.

The real issue is whether the way that retail service providers manage traffic gives rise to competition issues.

27. Do you think the regulatory regime is capable of addressing net neutrality issues if they arise in New Zealand? If not, what approach should we consider?

- a. Are there elements of the rules and expectations introduced in the European Union and United States that would be useful to have in the New Zealand regime?

The real issue is whether behaviour by network operators results in competition issues. New Zealand has well defined competition and consumer laws, and an active competition law agency in the Commerce Commission.

28. What do you consider is acceptable traffic management and what is not acceptable? Please provide specific and realistic examples. For example, should telecommunications providers:

- a. be able to block or deprioritise lawful content, applications, or services?*
- b. be able to enter into commercial agreements with content providers to prioritise certain traffic?*
- c. be able to prioritise certain types of traffic when their network is congested (such as voice traffic or emergency services calls)?*

The internet today is complex with traffic providing a range of different services. All of these services require different techniques to manage network capacity and ensure that all consumers obtain the service they are seeking.

It is important that traffic management does not result in adverse competition outcomes, and that consumers are aware of the traffic management policies of their retail service provider. Competition and consumer law provide appropriate tools and remedies to deal with possible competition problems. In addition, the TCF Broadband Product Disclosure Code provides transparency and disclosure of traffic management policies by TCF members.

29. Are there other net neutrality matters you consider should be considered in a regulatory context (for example, peering or certain content distribution practices)?

No

30. Do you have any suggestions for encouraging deregulation as part of the regulatory process?

The Commission is already required to regularly review existing regulation under the Act, and recommend, where appropriate, the removal of regulation where competitive bottlenecks have been removed.

31. Do you support the Commerce Commission having the flexibility to:

- a. implement price-only regulation?*
- b. adopt either a one- or two-stage pricing process?*

There is a direct relationship between the non-price terms of the service offered, and the cost-based price to offer it. Having price-only regulation is unlikely to add to the current designated (price and non-price terms) and specified (non-price terms only) service specifications available today.

TCF members have differing views about the desirability of the Commission being able to adopt a two-stage pricing process and will submit separately on this point.

32. Do you have any comments on the current arrangements for consumer representation?

TCF members have differing views about the current arrangements for consumer representation, and will submit separately on this point.

33. In your view, is there justification for the Government to make it clear in legislation whether or not backdating will occur?

TCF members have differing views about the appropriateness of backdating, and will submit separately on this point.

34. In your view, is there still a need for a separate Telecommunications Commissioner (rather than using the general Commissioners)?

TCF members have differing views about the need for a separate Telecommunications Commissioner, and will submit separately on this point.

35. Would the increased accountability created by a merits review process outweigh the risk of increased uncertainty and length added into regulatory processes?

Merits review is attractive as a means of holding the Commission to account and ensuring rigor for the Commission's decisions. The use of a utility style RAB model for UFB services would be new to the Industry. In which case there would be some value in the Commission being required to set out its approach to the input methodologies, and having the Commission's approach subject to merits review.

36. Do you have any suggestions for the most effective way to transition to a new regulatory framework, and to ensure any updated framework remains fit for purpose over time?

This submission sets out the TCF work to inform the potential transition towards a utility style RAB model.

37. Do you have any comments on the potential removal of the 'broadcasting exclusion' in the Telecommunications Act?

It is not clear that amending the existing exception for broadcasting infrastructure in the Telecommunications Act will have a material impact on telecommunications markets.

38. Are you aware of any barriers to trans-Tasman trade in communications markets that the Government should address, or areas where closer harmonisation with Australia would be beneficial?

The allocation of spectrum is the most important issue that needs to be coordinated internationally and this is largely managed by the global Radio Spectrum standards.

39. Please outline any other modifications you propose should be made to the regulatory framework, explaining how these would align with section 157AA(a) of the Telecommunications Act

TCF members will make separate submissions on this question.