



**New Zealand Telecommunications Forum (TCF) Submission to  
Commerce Select Committee on the  
Telecommunications (Property Access and Other Matters) Amendment Bill  
18 August 2016**

**Executive Summary**

The New Zealand Telecommunications Forum (TCF) appreciates the opportunity to submit to the Commerce Select Committee on the Telecommunications (Property Access and Other Matters) Amendment Bill (the Bill). The TCF supports the proposed changes to the Telecommunications Act 2001 (the Act) contained in the Bill, the purpose of which is to allow more people to have the benefits of a fibre connection while also reducing the time taken to obtain the consent of all parties who have an interest in the property that a fibre connection needs to occupy. The TCF would welcome the opportunity to present this submission in person.

The TCF is the telecommunications sector's industry body and has a vital role in bringing together the telecommunications industry and key stakeholders to resolve regulatory, technical and policy issues for the benefit of the sector and consumers. Its members represent 95% of the sector. The TCF is in a unique position to provide feedback as its members are actively involved with rolling out fibre networks nation-wide, and in connecting customers to new broadband services. We see at first-hand the difficulties with connecting consumers to the UFB network caused by the lack of responses from property owners from whom consent is required. The provisions of the Bill will facilitate the UFB roll-out and will enable more consumers to be connected.

Since August 2015, the average percentage of UFB orders that require consent from third party property owners is 17 percent. Of these orders, 31 percent fail to obtain all of the necessary third party property owner consents and are therefore cancelled. Failure to gain consent can be attributed to a number of factors, the most significant being the failure of the property owner to respond to the consent request from the LFC, or they decline the

consent for no particular reason. The TCF believes that the NPV of the cost to the industry of these cancelled orders through to 2020 is up to \$40 million.

In the TCF's view, implementing the changes outlined in the Bill will:

- Allow more consumers to connect to the UFB (including, potentially, other prescribed technologies);
- Reduce the time and cost to the telecommunications industry of accessing shared property in order to connect consumers in situations where there has been no response from affected persons;
- Provide improved access and maintenance provisions for the UFB network; and
- Protect the rights of third party property owners in relation to the installation of fibre to the premises across or into, shared property.

Improved access to third party property is an important issue for the Telecommunications industry. Consequently, the TCF is already looking at what changes might be required across the industry in order to utilise the provisions of the Bill.

Accordingly, this submission comments only on the amendments to subpart 3 of part 4 of the Act (relating to property access and dispute resolution), and makes specific recommendations to improve each of these parts to better achieve the objectives of the Bill.

## **General Access Provisions**

### **1. Right of Re-entry for Subsequent Connections**

The Bill is silent about the ability of the FTTP provider or network operator to re-enter third party property for the purposes of completing an installation. As an example, it is possible that the end user who has requested a connection is located near the front of a shared driveway and the installation down the entire shared property may be completed incrementally. The completion of the installation in the shared property might occur some months later when other end users further down the driveway seek a connection.

The TCF understands that the categorisation of an installation will be based on the nature of the installation that will be required for the entire driveway. However, once the process for gaining access has been completed, access should be ongoing for the purposes of completing or extending the installation work, including work required to provision subsequent connections<sup>1</sup>, as it would be for gaining access to perform network repairs, upgrades and maintenance.

Reinstatement of the area affected by the installation may also be completed incrementally. As an example, temporary reinstatement may be effected pending additional work being

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<sup>1</sup> Subsequent connections could include lateral connections for additional end users.

completed in the local area, or to make the area safe. It may be more efficient to deliver particular resources and skills to an area and complete all reinstatements at one time.

Clause 155H of the Bill provides for ongoing access for maintenance, repairs or upgrades to the network. However, this does not appear to include extensions to the installation, reinstatement of the area affected by the installation work, or the installation of lateral connections for additional end users

For the avoidance of doubt, the Bill should clarify that once the formal process of access to shared property has been triggered for the first installation, FTTP providers and network operators are able to re-enter the property to complete or extend the installation or provision subsequent connections as and when required by FTTP providers or network operators.

#### *TCF Proposal*

- For the avoidance of doubt a provision should be added to the Bill to clarify that ongoing access for maintenance includes completion or extension of an installation, reinstatement of the area affected by the installation and provisioning of lateral connections for additional end users.

## **2. 155D Definition of Affected Person**

Clause 155D of the Bill states:

“in relation to property and a category 1 or category 2 installation,—

- (a) means a person whose consent an FTTP service provider or a network operator would, but for this subpart, have to obtain before entering the property or carrying out the installation; and
- (b) does not include the person who placed the order with a retail provider for the FTTP service to be installed.”

The TCF would like to highlight two issues with clause 155D.

First, subsection (b) removes some of the rights of an affected person by virtue of the fact that they have placed an order for a fibre connection. The definition of an affected person is that their consent would have been sought in the absence of the provisions in the Bill. Currently, the person who places the order would have been asked for consent to access shared property, this consent would be sought at the beginning of the process when they sign their approval of the initial scope and end user terms. By definition, this person is an affected person.

In the TCF’s view, if the person who places the order is an affected person, they should have the same rights as other affected persons to object to the nature of an installation. The fact that they have asked for the services to be connected does not remove their interest in the outcome for the shared property.

The TCF understands that provisions in cl 155ZI are intended to allow the person who placed the order to take a dispute about the installation or reinstatement work performed on the shared property. However, the easiest way to manage this is to remove the exclusion of the person who placed the order, from the definition of affected person. There is no clear rationale for limiting the rights of the person who placed the order if they are, by definition, an affected person. It is more appropriate for all affected persons to be able to raise a dispute according to the rules of the scheme, irrespective of whether they placed an order or not.

Secondly, the example associated with this clause implies that any person with an easement is included in the definition of 'affected person'. Clearly, the intention of the Bill is to define affected persons as those people that FTTP providers or network operators seek consents from today. Although many third party property owners do have easements over the shared property it is not the way the FTTP providers or network operators currently define who they should seek consent from. There are a number of people who have easements, but would not have, at least in the TCF's view, a legitimate right to object as defined by 155D(a). For example, an electricity company may have easements over the shared property, but the FTTP provider or network operator does not currently seek consent from the electrical company. It would be useful if the example in the Bill could be amended to more accurately reflect the current situation.

#### *TCF Proposal*

- Remove (1)(b) from Clause 155D. This will allow the person who placed the order to be an affected person (provided they are someone the FTTP provider or network operator would seek a consent from today);
- Remove Cl 155ZI (1)(a)(i). This provision will be redundant if the change to the definition of affected person above is accepted; and
- Replace the example for this clause with something more relevant to the definition of affected person.

### **3. 155F Statutory Rights of Access**

Clause 155F of the Bill states:

"This subpart does not limit the statutory rights of access in sections 120 to 127 (which provide for network operators to apply to a District Court for an order authorising entry to land to perform certain work)".

It should be noted that the text in the brackets of this clause is not entirely accurate. Section 125 of the Telecommunications Act provides a statutory right of access for existing lines and existing works without the need for a Court Order.

#### *TCF Proposal*

- Amend the language in the brackets of Cl 155F to clarify that the rights under sections 120 – 127 are wider than suggested.

#### **4. 155ZD Ongoing Rights of Access**

Clause 155ZD of the Bill provides for ongoing access for the purpose of maintenance, repair and upgrades. As noted earlier, the TCF believes that this provision should be extended to allow for completion or extension of an installation, reinstatement of the area affected by the installation and provisioning of lateral connections for additional end users.

Secondly, clause 155H limits the period of the statutory rights of access until 1 January 2025. This clause applies a sunset clause to the rights of access for the purposes of “installing fibre optic media”. By specifically restricting this provision to “installing” fibre, it appears that the policy intent is that other provisions, including the ongoing right of access for the purposes of maintenance in cl 155ZD will endure beyond 1 January 2025. However, the definition of installing in the Bill includes maintenance which suggests that cl 155ZD will also expire on 1 January 2025. The TCF submits that this is not a desirable or probably an intended consequence.

#### *TCF Proposal*

- Add a provision to Cl 155ZD for the avoidance of doubt that the ongoing rights of access for maintenance under this clause, will endure beyond 1 January 2025.

#### **5. 155K(2) Preliminary Notice Category 1**

This clause, read in conjunction with clause 155Z(1)(a), requires two separate notices. The first is a formal Notice (the **Preliminary Notice**) which triggers the rights of access. The second notice is information to occupiers that their access to the shared property may be impeded temporarily while the work on the installation is completed. The rationale for both notices is well understood. However, it would be useful if the word “preliminary” were removed from the first notice so that the FTTP provider or network operator could use their discretion to issue one notice to all affected persons and occupiers at the same time. This would better achieve the purpose of the Bill which is to reduce the time required for installations.

Secondly, the FTTP provider or network operator will not always have precise dates for when the work will be completed in the shared property. The requirement of the notice to “state when” the FTTP provider or network operator will enter the property, could be removed or amended. When Cl 155K(2) and 155Z are read in conjunction, it is clear that five working days’ notice is required for affected persons, and “reasonable notice” is required to be given to occupiers. Both of these requirements can be met by one notice

being issued to affected persons and occupiers five working days prior to the work being undertaken.

Similar issues arise for the Category 2 “Preliminary Notice” when read in conjunction with clause 155Z(1)(a). The “Preliminary Notice” is the formal notice which triggers the objection process and the rights of access, and is a single notice. The second requirement is less formal information about the intention to commence work and is addressed to occupiers rather than affected persons (although in many cases, these will be the same people). In addition, the same requirements for a specific date to be nominated for entry appear to apply.

#### *TCF Proposal*

- Removed the word “preliminary” from the notice in cl 155K, 155L and 155M. This will remove the requirement for two separate notices and allow the FTTP provider or network operator to have discretion to issue a single notice to all affected persons and occupiers at the same time for Category 1.
- Remove the requirement to “state when” the installation will occur, or amend this requirement to be an indication, rather than a specific date.

### **6. 155T Grounds for Body Corporate to Object**

Clause 155T contains additional grounds for a Body Corporate to object to an installation:

- “(a) the body corporate considers that the installation will result in unacceptable disruption to the availability of telecommunications services to unit owners:”

Clause 155T(a) is very broad and unclear. The TCF understands the rationale behind the clause, but is concerned that it is too vague and therefore difficult to measure. If the intention is to ensure that any business customer has telecommunication services during working hours then the clause should reflect this requirement. As it is currently worded, the TCF is concerned that the clause may be overused by Body Corporates as a reason to object to an installation because this assessment is allowed to be made purely at the Body Corporate’s discretion.

#### *TCF Proposal*

- Amend sub clause (a) to allow an objection on the basis that the installation method proposed to be used by the FTTP provider will disrupt the availability of telecommunication services for business end users during business hours.

### **7. 155ZB Reinstatement**

Clause 155ZB requires that the “Property” be reinstated after an installation. The term “property” should be limited to be only the area where the installation work was actually

performed by the FTTP provider or network operator. There is no issue with repairing any damage to property which occurs as a natural consequence of the installation. However, the TCF has seen people ask for an entire driveway to be re-laid after an installation rather than repaired in the area of the installation. The TCF submits that it is not appropriate to re-lay the entire surface of a driveway, and this interpretation can be removed by replacing the word property with “the area impacted or disturbed by the installation”.

#### *TCF Proposal*

- Modify the term “Property” by replacing it with: “the area impacted or disturbed by the installation”.

### **8. 155ZE Conditions of Access for Maintenance and Repair**

The right to re-enter for maintenance and repair is conditional on providing reasonable notice, and being at reasonable times. This provision is contrary to s. 126(2) of the Act which allows immediate entry if necessary in circumstances of probable danger to life or property or immediately necessary to maintain the continuity or safety of supply of telecommunications. Similar provisions should be included for this sub-part.

#### *TCF Proposal*

- Include provisions which allow immediate entry if necessary in an emergency, consistent with s.126(2) of the Act.

### **Dispute Resolution**

### **9. Scheme Applicant**

The TCF supports the proposal that there should be a dispute resolution scheme associated with the Land Access provisions of the Act. Currently, the telecommunications industry has in place the Telecommunications Dispute Resolution Scheme (TDRS) which deals with disputes between consumers and Retailers Service Providers (RSPs). The Land Access dispute resolution scheme will deal with disputes between third party property owners and FTTP providers or network operators. There is a perception that there will be a gap between these two schemes in that consumers do not have recourse to dispute resolution where a FTTP provider or network operator is believed to be at fault because the TDRS allows consumers to raise a dispute only with the RSP who they have a direct billing relationship with.

The TCF is currently reviewing the TDRS with a view to ensuring that this perceived gap does not exist. The intention of the review is to develop a complete package to allow any dispute relating to the industry to be taken to one place for resolution. In order that the TCF can develop such a package, it is essential that the Act (as amended by the Bill) does not exclude the TCF from proposing a solution for the land access dispute resolution scheme. It is also imperative that the funding of the scheme is fairly allocated across the wholesale and retail members of the industry.

The proposed new Schedule 3C to be inserted into the Act provides that any “dispute is determined by a neutral third person” (Cl 1(2)(a)(ii)). The TCF agrees that this is an essential element of any dispute resolution scheme. However, in relation to the approval process for the scheme, the Schedule refers to the scheme applicant and the scheme provider as though they were one and the same person. The TCF submits that it is likely to be the applicant in relation to proposing a scheme for approval, not the provider of the scheme. The dispute resolution scheme will be provided by a neutral third party, as required by the Bill. Consequently, it is irrelevant whether the “applicant’s directors and senior managers are competent to manage a dispute resolution scheme”<sup>2</sup> as the TCF will not be managing the scheme or providing the dispute resolution service.

The TCF proposal will likely involve a mandatory TCF Code which will set out the rules of the scheme. The independence requirements of the scheme will be met by the fact that the Minister will be the only person able to approve the scheme and any changes to the rules, and the scheme provider will be a neutral third party.

#### *TCF Proposal*

- Amend cl 2 definition of “provider” to read: in relation to a scheme means the person responsible for providing the dispute resolution service.
- Where the Bill requires the applicant to have competent managers and funding, these requirements should be associated with the scheme provider.
- Remove the requirement for the scheme provider to be the applicant for approval of the scheme. Any person should be able to apply to have a scheme approved.

### **10. Levy for Regulated Dispute Resolution Scheme**

In the absence of an approved dispute resolution scheme, the Bill provides that a regulated scheme may be imposed. Clause 155ZN proposes that “every FTTP service provider and network operator” must pay a prescribed levy. The TCF is concerned that the term FTTP service provider has been defined in the Bill for the purposes of the proposed subpart 3 of Part 4 of the Act however, the term network operator is defined in the primary Act. This definition of ‘network operator’ is broader than FTTP service provider, the TCF’s concern is that this term, particularly in relation to a regulated dispute resolution scheme levy, will capture many more parties than arguably are intended to be included.

The TCF assumes, from its reading of the Bill that the policy intention is that before a FTTP service provider or network operator may utilise the statutory rights of access under the Bill, they must, inter alia, be a member of the dispute resolution scheme (cl 155J). The dispute resolution scheme is defined as either the approved scheme or the regulated scheme (cl 155ZG). Where the scheme is a regulated scheme, cl 155ZN requires every FTTP service provider and network operator (or a prescribed class of those persons) to pay a prescribed levy.

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<sup>2</sup> Clause 4 (1)(e)



It is assumed that the requirement for every FTTP service provider and network operator to pay a levy would apply to only those persons who are required by the Bill to be members of the dispute resolution scheme. If this were the intention of the provision, it is not clear.

#### *TCF Proposal*

- Clarify which parties are intended to be responsible for paying the levy for a regulated dispute resolution scheme.

#### **Conclusion**

The TCF welcomes the proposed changes to the Act that are set out in the Bill. These changes will increase the number of people able to be connected to UFB and therefore able to obtain the associated benefits. At the same time, the provisions will reduce the time and cost associated with installing low and medium impact lead ins for consumers where there has been no response from affected persons, as well as protect the property rights of third party property owners. However, the TCF believes that some minor changes to the Bill will improve its effectiveness.

The TCF would welcome the opportunity to present this submission in person.

#### **Contact**

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