



TCF Submission on Telecommunications (New Regulatory Framework) Amendment Bill

February 2018

Introduction

This submission is made by the New Zealand Telecommunications Forum (TCF) in relation to the Telecommunications (New Regulatory Framework) Amendment Bill (The Bill). The TCF is the telecommunications sector's industry body which plays a vital role in bringing together the telecommunications industry and key stakeholders to resolve regulatory, technical and policy issues for the benefit of consumers, and the sector.

The TCF made submissions in the policy processes leading up to the Bill. This has included support for a move to a utility style Regulated Asset Base model being appropriate for UFB, and included recognising that high quality, resilient, world class competitive telecommunications services and infrastructure are of national importance for the promotion of social and economic progress in NZ.

The TCF has also supported an industry led code on copper withdrawal being completed before 2020, noted in this submission.

Otherwise, this submission sets out some general comments about the TCF's role, and focuses only on the consumer matters that arise in the Bill, rather than the proposed wholesale regulatory regime, with some detailed suggestions in the attached Appendix. Individual members will be making their own submissions on aspects of the Bill that are of particular importance to them. Please note that while Chorus supports this submission, it does not support the positions set out in the Appendix.

TCF Role

The TCF is an integral part of the telecommunications industry, with TCF member companies providing services to over 95 percent of the telecommunications industry by customer numbers. It facilitates the development of consensus based, self-regulatory codes, that set standards and specifications for the way the industry interconnects in order to provide services to end-users.

The TCF notes that the Bill proposes that the industry is required to take action to improve customer service, with the backstop of intervention by the Commerce Commission (the Commission) if industry

action fails to achieve improvements. The TCF welcomes this role, as much of the TCF's work is directed towards improving outcomes for end-users.

The TCF has a track record of delivering industry solutions for the benefit of end-users, particularly in conjunction with the Commission. Collaborative consultations such as on the number portability systems, fibre access terms and copper terms have demonstrated the value of a joint approach delivering more effective and efficient solutions for consumers.

The TCF has been facilitating a range of initiatives to improve customer service across the industry. Although individual companies compete vigorously to attract and retain customers, the TCF has a role to ensure that pan-industry processes are developed with the end-user in mind. The TCF's recent consumer-focused work includes:

Telecommunication Dispute Resolution:

Implementing improvements to the Telecommunication Dispute Resolution scheme, including:

- A targeted marketing campaign, funded by the Scheme Members, for the purpose of promoting the scheme to consumers. This had the impact of increasing the number of sessions and unique visitors to the site by 55% and 67% respectively.
- Scheme Members now include information about their internal complaints process and TDR on their customer invoices. This includes informing their customers that TDR will provide a free and independent consideration of a complaint matter.
- Proactive quarterly reporting of complaints data to the Commission, the Minister for Consumer Affairs and Minister for Communications, Consumer NZ, TUANZ and MBIE officials.

UFB Code:

Development of a customer-centric UFB installation Code, which will improve the way the industry works together to make UFB installations as painless as possible for the end-user.

Consumer Education:

Development of a consumer education channel through <https://www.facebook.com/letstalktelco/>, including refreshing the TCF website with increased consumer information.

Telecommunications Performance

Telecommunications customers are well served by the industry in New Zealand. The Ultra-Fast Broadband roll-out will be available to 87 percent of New Zealanders by 2022 and the first phase of that roll-out is 82 percent completed with uptake of 38 percent.¹ Costs to consumers continue to fall and the cost of mobile calls by low users and serious users is 49 percent and 31 percent respectively, lower than the OECD average². It is an industry which is experiencing rapid, significant and constant

¹ <http://www.mbie.govt.nz/info-services/sectors-industries/technology-communications/fast-broadband/documents-image-library/september-17-quarterly-broadband-update.pdf>

² 2016 Annual Telecommunications Monitoring Report <http://www.comcom.govt.nz/regulated-industries/telecommunications/monitoring-reports-and-studies/monitoring-reports/>; page 27

change. The challenge is that solutions for today's problems could impede tomorrow's innovation. The Commission reports that in relation to broadband performance in New Zealand:³

... high speeds are being consistently delivered by most fibre retailers. The evening peak congestion previously seen in the delivery of ADSL broadband has largely declined to negligible levels.

The structure of the industry has led to strong retail competition which has seen a range of different product offerings available to consumers. It is important to recognise that consumers will make a trade-off between price and quality when making their purchasing decisions and any retail regulatory regime must not impede the full gamut of product offerings being available to consumers. We note that when the UK Competition and Markets Authority⁴ reviewed the energy market in Great Britain, it outlined:

171. The stated purpose of RMR [Retail Market Review] was to promote customer engagement in the retail energy markets in order to improve the competitive constraint provided by customer switching. However, some of the RMR measures restrict the behaviour of suppliers and constrain the choices of customers in a way that may have distorted competition and reduced customer welfare.

Role of TCF in development of new codes

The TCF is committed to an industry-based programme of improving customer service outcomes for telecommunications customers.

As an industry body, the TCF has the adequate levels of experience and expertise to develop new industry codes that deliver on the policy objectives of the new regulatory framework. In our view the default process in the Bill for the development of new codes should be to allow the TCF to develop a new code, with the Commission's powers as a backstop to review such codes, and develop a Commission Code where the review and consultation outcomes deem industry Codes unfit for purpose.

However, the Bill could usefully clarify that the Commission must undertake a formal review of TCF Codes and provide feedback, (and where no industry code exists require that the Commission should always give industry the opportunity to develop a new code) before embarking on the process of developing its own Codes.

Copper Withdrawal Code

The TCF notes that the Bill provides for either the industry or the Commission to develop a copper withdrawal code. The TCF is currently developing a code which will set out the industry processes for migrating consumers from copper to fibre (or other technology) under particular circumstances such as natural disaster or community led undergrounding of infrastructure. This Copper Migration Code will arguably act as a guide to the copper withdrawal code which is contemplated in the Bill. Consequently, consistent with the views above, the TCF welcomes the proposal that the TCF could be asked to prepare the Code.

³ Ibid; page 8

⁴ <https://assets.publishing.service.gov.uk/media/5773de34e5274a0da3000113/final-report-energy-market-investigation.pdf>; page 41

Consumer Report/Information Disclosure

The Bill proposes that the Commission's responsibilities will be expanded to require it to publish a report to better inform consumer choice. We support this initiative in principle.

The Commission's information requisitioning powers are consequently expanded to allow it to require providers of telecommunications services to provide forecast, historical, or other information.

The retail service consumer report will potentially require a considerable amount of information from service providers, with no restriction on the Commission's ability to requisition information. Poorly targeted requisitions of data, particularly historical data, could result in considerable costs for service providers. The TCF submits that the Commission's powers should therefore be modified to include a reasonableness test, similar to the requirements of Section 98 of the Commerce Act. In addition, the Commission should be required to consult with the industry about the nature and definition of the information it wishes to obtain.

The ability of the Commission to requisition forecast information from retailers seems very unusual. The TCF submits that this power is not appropriate when the information relates to a competitive retail market where the purpose of the disclosure is to better inform consumer choice. The ability of the Commission to require retailers to prepare forecast information should be removed.

Given the level of competition in the retail markets, there must be provision to ensure that the Commission is able to protect commercially sensitive information, in the same way that it is able to protect such information obtained under the wholesale service provider information disclosure regime.

Consequently, the TCF submits that:

- The Commission should be required to consult with the industry before it determines and defines the information it requires under amended section 9A;
- The information may be requisitioned only where it is *necessary and desirable* for purpose of the Commission fulfilling its functions;
- The ability of the Commission to requisition forecast retail information should be removed; and
- The Commission should have an explicit ability and requirement to protect commercially sensitive retail information.

Conclusion

The TCF is well placed to develop solutions to issues relating to the quality of customer service across the telecommunications industry. The TCF has already commenced work with the industry to develop solutions which will improve customer service. Consequently, the retail service quality regime proposed in the Bill is consistent with the TCF's current approach. Any intervention in competitive retail markets will require genuine consultation between the Commission and the industry if it is not to have unintended consequences.

There are some issues arising from the Bill which could usefully be clarified, as suggested in the attached Appendix.

I welcome the opportunity to present this submission to the Select Committee in person.

Yours sincerely

A handwritten signature in black ink, appearing to read 'G. Thorn', followed by a horizontal line.

Geoff Thorn
Chief Executive Officer
New Zealand Telecommunications Forum (TCF)

Contact

For any queries regarding this submission please contact:

New Zealand Telecommunications Forum (TCF)
Geoff Thorn
TCF CEO

T: 09 475 0203
E: Geoff.thorn@tcf.org.nz
PO Box 302469
North Harbour
Auckland 0751

Appendix: Comments on Telecommunications (New Regulatory Framework) Amendment Bill re consumer matters

Clause	Current provision	Comments
<p>Clause 24(2): proposed section 9A(1)(e) - Functions of Commission in relation to sector monitoring and information dissemination</p>	<p>1(e) [the Commission] must make available reports, summaries, and information about retail service quality in a way that better informs consumer choice.</p>	<p>The Commission should have an explicit requirement to consult with industry and stakeholders before determining what information it requires in order to prepare a report intended to better inform consumer choice.</p>
<p>Clause 24(2): proposed section 9A(3) - Functions of Commission in relation to sector monitoring and information dissemination</p>	<p>(3) For the purpose of carrying out its functions under subsection (1)(d) and (e), the Commission may, in addition to exercising any other of its powers under this Act, by notice in writing, require any provider of telecommunications services to—</p> <p>(a) prepare and produce forecasts, forward plans, historical information, or other information; and</p> <p>(b) apply any methodology or format specified by the Commission in the preparation of forecasts, forward plans, historical information, or other information.</p>	<p>This proposed power is very broad with no restriction on the Commission’s ability to requisition information. It should be modified to state the power may only be used where it is <i>“necessary or desirable for the purposes of carrying out its functions.”</i> This would align it with section 98 of the Commerce Act 1986. It may require a significant amount of resource or in some case be impractical to re-produce data using specific defined methodologies and format. We would expect the Commission to be reasonable in any request for information.</p> <p>The ability of the Commission to requisition forecast information from retailers seems very unusual. This power is not appropriate in a competitive retail market where the purpose of the disclosure is to better inform consumer choice. The ability of the Commission to require retailers to prepare forecast information should be removed.</p> <p>The retail market for telecommunications services is competitive. There must be provision to ensure that the Commission is able to protect commercially sensitive information, in the same way that it is able to</p>

		protect such information obtained under the wholesale service provider information disclosure regime.
Clause 33: new section 227 - Purpose of retail service quality code	The purpose of a retail service quality code is to improve retail service quality for consumers of telecommunications services.	The purpose is broad and this leads to uncertainty for the industry. The problem of what needs to be fixed is not defined. This lack of clarity makes it difficult to understand how the adequacy of a code will be measured. Therefore, it is not clear how the Commission or industry will be able to measure whether any code achieves or fails to achieve this purpose.
Clause 33: new section 229 - Commission may issue guidelines	The Commission may issue guidelines to the telecommunications industry on any matters relating to retail service quality codes, including advice on what matters are appropriately dealt with by retail service quality codes.	We would expect any guidelines would be required to provide clear statements of the problem that is intended to be solved and the criteria for measuring adequacy and success. This requirement should be mandatory for the development or amendment of any industry code. Also see comments regarding clause 33, new section 231 below.
Clause 33: new section 231 - Commission retail service quality code (approval process for any Commission Code)	<p>(1) The Commission may make a retail service quality code in relation to the provision of 1 or more types of telecommunications service only if—</p> <p>(a) no industry retail service quality code has been made in relation to the service; or</p> <p>(b) an industry retail service quality code has been made in relation to the service, but in the Commission’s opinion—</p> <p>(i) the code fails to achieve the purpose set out in section 227; or</p> <p>(ii) a Commission RSQ code would better achieve the purpose set out in section 227.</p>	<p>Section 231(2) states that if the Commission wants to make a Commission Retail Service Quality (RSQ) code it just has to provide a report to the Minister with the reasons for making the code. This is a wide power and we submit that the test too low for the Commission to be able to develop its own code. It is recommended that this section is amended to:</p> <ul style="list-style-type: none"> • Make it explicit that the Commission must have first done a review under section 230 first before it provides a report to the Minister under s 231(2) that it intends to make a Commission RSQ code. • Require consultation with the industry before the Commission gets approval to draft a code.

	<p>(2) If the Commission intends to make a Commission RSQ code, the Commission must, before making the code, provide a report to the Minister containing the reasons for making the code and the provision of this section that applies.</p>	<p>(Although clause 233 allows for consultation, that is once the code is in the development process, not at the question as to whether a Commission RSQ code should be developed).</p> <ul style="list-style-type: none"> • Require that the Commission should always give industry the opportunity to develop a new code, or amend an existing code, to address the issue that the Commission has identified, with Commission’s power to develop a Code as a backstop. • Require Ministerial <i>approval</i> (rather than just provision of a report to the Minister) before the Commission can make a code.
<p>Enforcement: Clause 25: Section 156A amended Clause 26: Section 156B amended Clause 33: Section 242</p>	<p>Section 156A amended (Application of section 156B) After section 156A(1)(n), insert: (o) fails, without reasonable excuse, to comply with a Commission RSQ code: (p) fails, without reasonable excuse, to comply with the copper withdrawal code.</p> <p>Section 156B amended (Enforcement actions that Commission may take) (3) After section 156B(1)(b), insert: (c) in relation a person who commits a breach referred to in section 156A(1)(o) or (p), accept an undertaking under section 156CA. (4) After section 156B(1), insert: (1A) The Commission may, in addition to or instead of taking action under subsection (1), take 1 or both of the following actions against a person who commits a breach referred to in section 156A(1)(o): (a) apply to the High Court for an order under section 156MA:</p>	<p>With any Commission RSQ code the dispute resolution scheme will be the industry dispute resolution scheme, unless Part 4B comes into force. New section 242 requires the dispute resolution scheme to enforce the provisions of the scheme and RSQ code. Amended sections 156A and 156B will also provide the Commission with the power to take enforcement action for a breach of a Commission RSQ code. While the Bill at clause 33, new section 243, requires the court to have regard to any other orders for the same matter, the High Court’s powers are very wide. These two enforcement mechanisms overlap. This could create uncertainty for the industry and as such there should be some criteria for the Commission to establish before being able to take action in the High Court.</p>

	<p>(b) apply to the High Court for an order under section 156MB.</p> <p>(1B) The Commission may, in addition to or instead of taking action under subsection (1), take 1 or both of the following actions against a person who commits a breach referred to in section 156A(1)(p):</p> <p>(a) apply to the High Court for an order under section 156MC:</p> <p>(b) apply to the High Court for an order under section 156MD.</p> <p>New section 242 - The purpose of a dispute resolution provider, in relation to a dispute resolution scheme for a retail service quality code, is—</p> <p>(a) to operate the scheme; and</p> <p>(b) to administer the relevant code; and</p> <p>(c) to manage consumer complaints relating to the code; and</p> <p>(d) to investigate disputes relating to the code; and</p> <p>(e) to promote awareness of the scheme and the code; and</p> <p>(f) to monitor compliance with the scheme and the code; and</p> <p>(g) to enforce the provisions of the scheme and the code.</p>	
<p>Clause 29: New section 156MB - Other orders for breach of Commission RSQ code</p>	<p>(1) The High Court may make 1 or more of the following orders if the High Court is satisfied, on the application of the Commission, that a person (person X) has committed a breach referred to in section 156A(1)(o):</p> <p>a) an order directing person X to refund money or return property to any other person:</p>	<p>Powers given to the High Court are very wide. The Commission may request the High Court to:</p> <ul style="list-style-type: none"> ○ vary or void all or part of a contract made between <i>“person X and any other person, or a collateral arrangement relating to such a contract”</i>.

	<p>(b) an order directing person X to pay to any other person the amount of any loss or damage caused to that other person by the conduct of person X:</p> <p>(c) an order directing person X, at person X's own expense, to supply a service to any other person:</p> <p>(d) an order declaring all or part of a contract made between person X and any other person, or a collateral arrangement relating to such a contract,—</p> <p>(i) to be void; and</p> <p>(ii) if the court thinks fit, to have been void at all times on and after a date specified in the order, which may be before the date on which the order is made:</p> <p>(e) an order in respect of a contract made between person X and any other person, or a collateral arrangement relating to such a contract,—</p> <p>Part 3 cl 29 Telecommunications (New Regulatory</p> <p>(i) varying the contract or the arrangement in the manner specified in the order; and</p> <p>(ii) if the court thinks fit, declaring the varied contract or arrangement to have had effect on and after a date specified in the order, which may be before the date on which the order is made.</p>	<p>o Require that person, <u>or any other person involved in the breach</u> to disclose, at that person's own expense information or corrective statements.</p> <p>This provision could have unintended consequences and could potentially affect other commercial arrangements (eg discourage equipment providers from distributing products in NZ).</p> <p>In practice however, we consider a Court would be very unlikely to use its powers to address service provider's wholesale contracts. We expect these powers are more likely to be used to influence contracts between the retail provider and its end users.</p> <p>Relying on the Court to address wholesale (supplier) issues is an inefficient and risky solution: in the case where service quality is a result of a wholesale provider (for example a problem with the quality of installations) the Commerce Commission must first create a Commission RSQ code which binds retail providers which the retail providers will fail to meet. The retail service provider must then be referred to the Court for breach of the Code and the Court may (or as we expect may not) use its powers to influence the supply arrangement.</p> <p>This creates uncertainty and involves the RSP in the process. It also requires that the code is a Commission RSQ code thereby ruling out the potential for an industry code to address the wholesale issue.</p> <p>The issues could be more efficiently addressed directly with the wholesale providers by including them in a Code to begin with.</p>
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Clause 33: New section 240	(1) The Commission must, at least once every 3 years, review any dispute resolution scheme that— (a) has been set up by the telecommunications industry; and (b) deals with consumer complaints.	The Commission’s requirement to review any telecommunications dispute resolution scheme set up by the industry should be extended to all telecommunications dispute resolution schemes (e.g. the Broadband Shared Property Access Dispute Resolution Scheme).
Other matters: Regulated wholesale services		The bill provided limited ability for the Commission to amend the service performance of regulated wholesale copper and fibre services, yet these services are an important determinant of retail service quality. It is not clear how these quality standards will be managed under the current drafting.