

House of Representatives
Supplementary Order Paper

Tuesday, 14 June 2011

Telecommunications (TSO, Broadband, and Other
Matters) Amendment Bill

Proposed amendments

Hon Steven Joyce, in Committee, to move the following amendments:

Clause 4

To omit *subclause (1)* (lines 27 to 31 on page 12) and substitute the following subclause:

- (1) Section 5 is amended by repealing the definitions of **constitution of Telecom, financial year, KSO, liable person, liable person's TSO-qualified revenue, net cost, original KSO, TSO cost calculation determination, TSO instrument or telecommunications service obligation instrument, and TSO provider's TSO-qualified revenue.**

Definition of **new KSO** in *subclause (2)*: to omit this definition (line 33 on page 13).

Definition of **qualified revenue** in *subclause (2)*: to omit “gross” (line 3 on page 14).

New clauses 6A and 6B

To insert the following clauses after *clause 6* (after line 19 on page 15):

6A Purpose

Section 18 is amended by inserting the following subsection after subsection (2):

- “(2A) To avoid doubt, in determining whether or not, or the extent to which, competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand is promoted, consideration must be given to the incentives to innovate that exist for, and the risks faced by, investors in new telecommunications services that involve

significant capital investment and that offer capabilities not available from established services.”

6B Deemed TSO instrument

Section 71 is amended by repealing subsection (2) and substituting the following subsection:

- “(2) Subsection (1) applies to any other instrument that—
- “(a) includes or records provisions that state that the parties intend the instrument to be a deemed TSO instrument under this Act; and
 - “(b) is conditional on, or entered into as a consequence of, the structural separation of Telecom.”

New clauses 7A and 7B

To insert the following clauses after *clause 7* (after line 32 on page 15):

7A Sections 72 and 73 repealed

Sections 72 and 73 are repealed.

7B Section 74 substituted

Section 74 is repealed and the following section substituted:

“74 Compliance with TSO instrument

- “(1) A TSO provider must comply with the terms of a TSO instrument.
- “(2) The statutory duty in **subsection (1)** does not limit or affect any right, duty, liability, or remedy in respect of a TSO instrument that exists or is available apart from this Act.”

Clause 11

New section 80: to omit the definition of **minimum qualified revenue** (lines 19 to 21 on page 17) and substitute the following definition:

“**minimum telecommunications revenue** means \$10 million, or such other amount, as may be prescribed by regulations made under **section 101(1)(a)**, of gross revenue (as may be determined in accordance with any specifications set by the Commission) that a liable person receives during a financial year for supplying either or both of the following (excluding any amount paid to a liable person by the Crown as compensation for the cost of complying with a TSO instrument that contains a specified amount):

- “(a) telecommunications services by means of its PTN;
- “(b) telecommunications services by means that rely primarily on the existence of its PTN or any other PTN.

New section 81(1): to omit *paragraph (b)* (lines 35 to 37 on page 17) and substitute the following paragraph:

“(b) the liable person’s telecommunications revenue for the year preceding financial year A was less than the minimum telecommunications revenue.

New section 81(2)(ab): to omit “qualified revenue” (lines 9 and 10 on page 18) and substitute “telecommunications revenue”.

New section 81(3)(a): to omit “qualified revenue” (line 21 on page 18) and substitute “telecommunications revenue”.

New section 85: to add the following subsection (after line 9 on page 20):

“(2) To avoid doubt, the Commission may determine what revenue basis to use for the purposes of **subsection (1)(a)** (for example, a net revenue basis).

New section 94AA(3): to omit “**sections 94 to 94I**” (line 6 on page 25) and substitute “**sections 94D to 94I**”.

New section 100(1)(b): to add “**or 94AA(3)**” (line 8 on page 31).

New section 101(1)(a): to omit “minimum qualified revenue” (lines 4 and 5 on page 33) and substitute “minimum telecommunications revenue”.

New section 101(3): to omit this subsection (lines 29 to 33 on page 33) and substitute the following subsection:

“(3) The Minister must not recommend the making of regulations under **subsection (1)(a)** unless the Minister is satisfied that, if the regulations were made, the minimum telecommunications revenue under those regulations would not exceed the maximum telecommunications revenue threshold.

New section 101(4): to omit “**maximum qualified revenue threshold**” (lines 34 and 35 on page 33) and substitute “**maximum telecommunications revenue threshold**”.

Clause 17B

New section 155B: to insert the following definition after the definition of consumer complaints system (after line 28 on page 36):

“**fibre-to-the-premises access network** has the same meaning as in **section 156AB**

New section 155B: to omit the definition of **multi-unit complex** (line 32 on page 36 to line 5 on page 37) and substitute the following definition:

“**multi-unit complex** means—

- “(a) a building that contains 2 or more distinct units (including the land on which the building is sited); or
- “(b) a group of buildings that are used communally (including the land on which those buildings are sited)

New section 155B: to omit the definition of **owner** (lines 6 to 15 on page 37) and substitute the following definition:

“**owner**, in relation to any part of a multi-unit complex, means any 1 or more of the following:

- “(a) a person who has a freehold or a leasehold interest in that part of the complex:
- “(b) any body corporate under the Unit Titles Act 1972 or the registered proprietor of the complex to which the unit plan relates:
- “(c) any other person who has a legal right to grant access to the building or to approve the performance of work in the building

New section 155DA: to insert the following section after *new section 155D* (after line 27 on page 38):

“**155DA How statutory right of access to multi-unit complex must be exercised**

- “(1) The entry to a multi-unit complex under **section 155C** must only be made by an officer, employee, or agent (including a contractor) of the FTTP service provider authorised by it in writing.
- “(2) The person entering must produce evidence of his or her authority and identity—
 - “(a) on initial entry; and
 - “(b) after the initial entry, on request.
- “(3) **Subsections (1) and (2)** are subject to the terms and conditions of any access order from the District Court under **section 155H**.
- “(4) In this section, **evidence of authority** has the same meaning as in section 118, with any necessary modifications.

Clause 22

Subclause (2)(b)(i)(B): to omit “the minimum qualified revenue” (lines 24 and 25 on page 48) and substitute “\$5 million”.

Subclause (2)(d): to omit “gross” (line 29 on page 48) and substitute “amount of”.

Clause 23GAA

To insert after “that the Minister considers” (line 5 on page 53) “best”.

New heading and clauses 23GDC to 23GDF

To insert the following heading and clauses after *clause 23GDB* (after line 15 on page 56):

Discontinuance of accounting separation

23GDC Section 69ZB repealed

Section 69ZB is repealed.

**23GDD Miscellaneous provisions relating to Commission’s
information disclosure requirements**

Section 69ZD(1) is amended by omitting “69ZB or”.

23GDE Pecuniary penalty

Section 156L(3)(b) is repealed.

23GDF Further penalty may be imposed for continuing breach

Section 156M(1)(b) is amended by omitting “69ZB(7),
69ZC(4), or 69ZF(2)” and substituting “69ZC(4) or 69ZF(2)”.

Clause 23H

Definition of **sharing arrangement** in *new section 69C*: to add “; or” (line 36 on page 58) and also to add the following subparagraph (after line 36 on page 58):

- “(vii) an arrangement that relates to ensuring compliance by Telecom, Chorus, or both with—
 - “(A) the duties imposed by the Telecommunications (Interception Capability) Act 2004 on a network operator (within the meaning of that Act); or
 - “(B) duties or requirements imposed by any other Act, interception warrant, or other lawful authority that relate to the interception of communications.

New section 69S: to omit *subsection (3)* (lines 19 to 23 on page 67) and substitute the following subsection:

- “(3) Without limiting **section 69O**, Chorus is deemed to participate in the supply of a telecommunications service if a related party of Chorus participates in the supply of the telecommunications service.

New section 69W: to omit the definition of **legacy access network** (line 33 on page 68 to line 11 on page 69) and substitute the following definition:

- “**legacy access network** means the network comprising—
 - “(a) Chorus’s local loop network, as defined in clause 1 of Part 1 of Schedule 1 (including any relevant line in Chorus’s local telephone exchange or distribution cabinet); and
 - “(b) Chorus’s local telephone exchange, as defined in clause 1 of Part 1 of Schedule 1, and Chorus’s distribution cabinet (or equivalent facility); and
 - “(c) Chorus’s backhaul network (whether copper, fibre, or anything else) between the local loop network handover point in Chorus’s distribution cabinet (or equivalent fa-

- cility) or Chorus's local telephone exchange and the first data switch (including the first data switch); and
- “(d) Chorus's digital subscriber line access multiplexer (or equivalent facility)

New section 69X(1): to omit “timetable” (line 27 on page 71) and substitute “plan containing time frames”.

Clause 23HD

New section 94CA(2): to omit “the end of each financial year,” (line 28 on page 87) and substitute “receiving the copy of the notice served under **section 93(3)**,”.

New clause 23HFA

To insert the following clause after clause 23HF (after line 32 on page 89):

23HFA Section 95 repealed

Section 95 is repealed.

Clause 23J

To omit this clause (lines 31 and 32 on page 90).

Clause 23K

To omit this clause (lines 1 to 3 on page 91).

Clause 23M(2)

To omit this subclause (line 22 on page 91).

Clause 23N(2)

To omit “by repealing paragraph (b) and substituting the following paragraphs:” (lines 31 and 32 on page 91) and substituting “by inserting the following paragraphs after **paragraph (ab)**.”.

Clause 23O(2)

To omit this subclause (lines 21 and 22 on page 92).

Clause 23P

To omit this clause (lines 23 to 28 on page 92).

Clause 23Q

To omit this clause (lines 29 to 32 on page 92).

Clause 23R(3)

To omit this subclause (lines 11 and 12 on page 93).

Clause 23RA

To omit this clause (lines 13 to 16 on page 93).

Clause 23ZD(2)(a)

To add “, if that price is set out in the standard terms determination before the day before separation day” (line 16 on page 100).

Clause 24

New section 156AA(1): to omit *paragraphs (a) and (b)* (line 14 on page 101 to line 10 on page 102) and substitute the following paragraphs:

- “(a) requires providers of wholesale telecommunications services that are provided using a fibre optic communications network that is constructed, in whole or in part, with Crown investment funding provided as part of the Ultra-fast Broadband Initiative, or that provide access to unbundled elements of such a network, to give enforceable undertakings providing for non-discrimination, equivalence, and other matters in relation to the supply of those services (**subpart 2**); and
- “(b) restricts unbundling of point-to-multipoint layer 1 services before 1 January 2020 in respect of those service providers (**section 156AR**); and
- “(ba) requires those service providers to disclose information concerning costs and other matters in accordance with requirements of the Commission (**subpart 3**); and

New section 156AB: to insert the following definition after the definition of information (after line 15 on page 104):

“**layer 1 service** has the same meaning as in the document ‘New Zealand Government Ultra-Fast Broadband Initiative Invitation to Participate in Partner Selection Process’ dated October 2009 (as amended)

New section 156AB: to omit paragraph (b) of the definition of **LFC** or **local fibre company** (lines 22 to 24 on page 104) and substitute the following paragraph:

“(b) a company in which the Crown holds a financial interest pursuant to the selection of that company as a UFB partner

New section 156AB: to omit the definition of **LFC fibre network** (lines 25 and 26 on page 104) and substitute the following definition:

“**LFC fibre network** means a fibre-to-the-premises access network that is owned or operated by an LFC

New section 156AB: to insert the following definition after the definition of non-discrimination (after line 34 on page 104):

“**point-to-multipoint layer 1 service** means a layer 1 service provided over a network configuration that enables each fibre to provide multiple end-point connections

New section 156AB: to insert the following definition after the definition of Rural Broadband Initiative (after line 13 on page 105):

“**service provider** means a provider of a relevant service

New section 156AD: to omit *subsection (1)* (line 11 on page 106) and substitute the following subsection:

- “(1) An LFC must enter into an undertaking in accordance with this subpart.

New section 156AD(3)(a): to omit “or layer 1 services” (line 18 on page 107) and substitute “(including layer 1 services)”.

New section 156AD(4): to omit this subsection (lines 21 to 25 on page 107).

Heading to new section 156AG: to omit “**may**” (line 26 on page 108) and substitute “**must**”.

Heading to new section 156AJ: to omit this heading (lines 32 and 33 on page 109) and substitute the following heading: “**LFC must submit undertaking for approval by Minister**”.

New section 156AJ: to omit “may” (line 34 on page 109) and substitute “must”.

Heading to new section 156AK: to omit “**undertakings**” (line 1 on page 110) and substitute “**undertaking**”.

New section 156AN(2)(b): to omit “promote” (line 13 on page 111) and substitute “give effect to”.

New sections 156AQA to 156ARA: to omit these sections and the heading above section 156AR (line 9 on page 113 to line 38 on page 114) and substitute the following heading and section:

“Effect of undertakings in relation to unbundling of certain services

“156AR Commission may not recommend or investigate unbundling of point-to-multipoint layer 1 services

- “(1) The Commission must not, before the close of 31 December 2019, provide a final report to the Minister recommending the unbundling of any point-to-multipoint layer 1 service that is provided by an LFC that is subject to a binding undertaking.
- “(2) The Commission must not, before the close of 31 December 2018, commence an investigation into the unbundling of any point-to-multipoint layer 1 service provided by an LFC that is subject to a binding undertaking.
- “(3) An LFC is subject to a binding undertaking for the purposes of this section if it has entered into an undertaking that has been approved by the Minister under this subpart and that is still in force.

New section 156AVA: to omit this section (lines 19 to 22 on page 116).

New section 156AW(1): to omit “to whom this subpart applies” (line 26 on page 116).

New section 156AW: to add the following subsection (after line 33 on page 117):

- “(5) To avoid doubt, nothing in this subpart requires an LFC to prepare and disclose information about the operation of all or any of its network or wholesale activities as if those activities were operated as independent or unrelated companies.

New section 156AZD(2)(b): to omit “the **Telecommunications (TSO, Broadband, and Other Matters) Amendment Act 2010** receives the Royal assent” (lines 15 to 18 on page 122) and substitute “the date on which this section comes into force”.

New section 156AZE(1A): to omit “the **Telecommunications (TSO, Broadband, and Other Matters) Amendment Act 2010** receives the Royal assent” (lines 5 to 7 on page 123) and substitute “the date on which this section comes into force”.

New section 156AZE(2): to omit “the date of commencement of this subpart” (lines 10 and 11 on page 123) and substitute “the date on which this section comes into force”.

Clause 25(1)

To omit this subclause (lines 17 and 18 on page 123) and substitute the following subclause:

- (1) Section 156A(g) is amended by omitting “section 69ZB(7), 69ZC(4), or 69ZF(2):” and substituting “69ZC(4), 69ZF(2), or **156AW**:”.

Clause 28

To insert the following subclause before *subclause (1)* (after line 9 on page 124):

- (1AA) Paragraph (e) of the definition of **enforceable matter** in section 156N is amended by omitting “a separation undertaking” and substituting “an undertaking”.

Subclause (2): to omit the new definition of **party** (lines 16 to 25 on page 124) and substitute the following definition:

“**party** means a party to an enforceable matter and includes, in the case of an undertaking under **Part 2A** or **4AA**, any provider of a telecommunications service that is affected by a breach of the undertaking.

Clause 29(3)

To omit “subsection (5)” (line 16 on page 125) and substitute “subsection (7)”.

New subsection (5): to omit “(5)” (line 18 on page 125) and substitute “(7)”.

Schedule 2A

Item relating to Clause 1: definition of local loop network

To insert “(including where it passes through a distribution cabinet)” after “Chorus’s local telephone exchange” (line 9 on page 132).

Item relating to Subpart 1 of Part 2: Retail services offered by means of Telecom’s fixed telecommunications network: to omit the item relating to *Description of service* (line 17 on page 133) and substitute the following item:

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- Description of service applicable before the expiry of 3 years from separation day:*
- A retail service that satisfies both of the following:
- (a) any of the following:
 - (i) a non-price-capped local access and calling service; or
 - (ii) a non-price-capped retail service (and its associated functions) supplying an access and calling service in a different form to the service described in subparagraph (i) (and including, for the avoidance of doubt, a service supplying ISDN digital access, or Centrex-based access or facsimile); or
 - (iii) a value-added non-price-capped retail service that is supplied in conjunction with a service described in subparagraph (i) or (ii) above or a price-capped residential local access and calling service; and
 - (b) a retail service offered by Telecom to end-users by means of a fixed telecommunications network in the following markets:
 - (i) all markets in which Telecom faces limited, or is likely to face lessened, competition for that service:
 - (ii) all, some, or no markets in which Telecom does not face limited, or is not likely to face lessened, competition for that service as determined by the Commission

- Description of service applicable after the expiry of 3 years from separation day:*
- A retail service that satisfies both of the following:
- (a) either of the following:
 - (i) a non-price-capped retail service (and its associated functions) supplying an access and calling service in a different form to a local access and calling service (and including, for the avoidance of doubt, a service supplying ISDN digital access, or Centrex-based access or facsimile); or
 - (ii) a value-added non-price-capped retail service that is supplied in conjunction with a service described in subparagraph (i) above or a local access and calling service; and
 - (b) a retail service offered by Telecom to end-users by means of a fixed telecommunications network in the following markets:
 - (i) all markets in which Telecom faces limited, or is likely to face lessened, competition for that service:
 - (ii) all, some, or no markets in which Telecom does not face limited, or is not likely to face lessened, competition for that service as determined by the Commission

Schedule 2A

To omit the item relating to **Subpart 1 of Part 2: Bundle of retail services offered by means of Telecom's fixed telecommunications network** (on page 138).

Schedule 3

Item relating to section 4: to omit *new paragraph (gaa)* and substitute the following paragraph:

“(gaa) provisions about undertakings required to be given by providers of certain telecommunications services involving fibre optic communications networks constructed in whole or in part using Crown investment funding, restrictions on unbundling in respect of such service providers, and the preparation and disclosure of information are set out in **Part 4AA**; and”.

To insert the following item after the item relating to section 5 (after line 23 on page 149):

Schedule 3: Part 1

Clause 1: add:

“(7) This clause is subject to **section 156AR**.”

Explanatory note

The main effects of this Supplementary Order Paper are that it—

- inserts *new clause 6A* to amend section 18, which is the purpose provision in Part 2 (Designated services and specified services) of the Telecommunications Act 2001 (the **Act**). The amendment inserts an avoidance of doubt provision recording that factors relating to investment in new markets are included among the factors that must be taken into account in determining whether, or the extent to which, competition in telecommunications markets is for the long-term benefit of end-users:
- makes changes to provisions relating to deemed TSO instruments and removes references to the KSO (**Kiwi share obligation**) (*new clauses 6B, 7A, 7B, and 23HFA*). These amendments are to reflect that the KSO will not be operative following the structural separation of Telecom:
- clarifies the threshold for determining whether a person is liable to pay the Crown the telecommunications development levy by simplifying the calculation required to be made for this purpose. Under the changes to *new section 80*, the calculation must be made by reference to gross revenue (as may be determined in accordance with any specifications set by the Commerce Commission) received from telecommunications services during a financial year. The change to *new section 85* reinstates subsection (2), which was in the Bill as introduced, with the effect that if a liable person is required to pay the levy then a more sophisticated calculation of net telecommunications revenues may be made in determining the amount payable. The transitional provision concerning the 2010/2011 financial year is amended to reflect the fact that for this financial year the Commerce Commission will continue to use a net revenue calculation (amendment to *clause 22(2)(b)(i)(B)*):

- narrows the definition of multi-unit complex to ensure that the provisions allowing access to multi-unit complexes by fibre-to-the-premises service providers are limited to multi-unit buildings or groups of buildings used communally:
- inserts a provision specifying how the statutory right of access to a multi-unit complex must be exercised by employees and agents on behalf of fibre-to-the-premises service providers (*new section 155DA*):
- removes, from the day after the Royal assent, the accounting separation requirements that currently apply to Telecom under the Act. The Bill as introduced provided for this removal to take effect on separation day:
- amends the definition of sharing arrangement in *new section 69C* to provide that this does not include any arrangement that relates to ensuring Telecom’s and Chorus’s compliance with the Telecommunications (Interception Capability) Act 2004 and related requirements:
- requires Ultra-fast Broadband Initiative service providers to enter into binding “open access” undertakings regarding the application of non-discrimination and equivalence rules in the provision of wholesale telecommunications services offered over infrastructure funded (in whole or in part) by Crown investment funding. The Bill as introduced enabled these undertakings to be given, but did not require it (because regulatory forbearance would have incentivised the giving of undertakings):
- removes regulatory forbearance. The Bill as introduced restricted the Telecommunications Commissioner from recommending regulation of access to the service provider’s fibre-to-the-premises access infrastructure until 31 December 2019. This Supplementary Order Paper removes regulatory forbearance from the Bill as introduced but retains an explicit restriction on the Telecommunications Commissioner recommending unbundling of point-to-multipoint layer 1 services:
- amends the service description in Schedule 1 of the Act that will apply on separation day for the designated access service “Retail services offered by means of Telecom’s fixed telecommunications network”. The amendments take account of changes to the service description made by an Order in Council made after report-back of the Bill and make the following further changes to reflect the structural separation of Telecom:
 - changes to the wording of the service description that applies on separation day to reflect that Telecom will not control an end-to-end PSTN:
 - changes to wording of the service description that will apply 3 years after separation day, to reflect the fact that the non-price-capped local access and calling service will be moved to the new combined local access and calling service provided for in the Bill.