



**MINISTRY OF BUSINESS,  
INNOVATION & EMPLOYMENT**  
HĪKINA WHAKATUTUKI



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# Regulatory Impact Statement

**Amendments to the Telecommunications Act 2001 to  
support the extension of Ultra-Fast Broadband**

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Public version

## Agency Disclosure Statement

- 1 This Regulatory Impact Statement has been prepared by the Ministry of Business, Innovation and Employment.
- 2 It provides an analysis of regulatory options to support the effective extension of the Ultra-Fast Broadband initiative (UFB2), through amendments to the Telecommunications Act 2001 to provide for:
  - a. the provision of deeds of undertaking relating to open access to the UFB network by UFB2 participants;
  - b. information disclosure by UFB participants to the Commerce Commission relating to the costs and characteristics of their services and the UFB2 network build cost; and
  - c. statutory authorisation of potential partnering arrangements between Chorus and the Crown that may emerge from the UFB2 tender process.
- 3 These issues were also identified and addressed as part of the UFB1 initiative. However, the design of the legislation means that they need to be addressed again as part of UFB2. MBIE has placed a high weighting on consistency with the settings established under UFB1.
- 4 In respect of Issue Three, MBIE has not carried out a full market and competition analysis. However, we are confident that the pro-competitive provisions built into the UFB programme will manage any potential competition issues arising in the wholesale market. The positive outcomes from the UFB programme are important context guiding the analysis in this RIS.
- 5 The statutory authorisation of potential partnering arrangements between Chorus and the Crown is being addressed on the hypothetical basis that Chorus may be the successful tenderer for some or all of the UFB2 coverage areas. However, the proposal to provide for statutory authorisation of this hypothetical scenario should not be viewed as pre-determining the outcomes of the tendering process in any participant's favour.
- 6 Time and resource constraints have prevented quantitative assessment of the options addressed in this RIS, although qualitative analysis has been undertaken.
- 7 MBIE has not formally consulted on the proposals in this RIS, however is satisfied that potentially affected parties have had a reasonable opportunity to raise any significant concerns with the same proposals as they applied in the UFB1 programme, and have not done so.

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## Background

- 8 The communications sector is a key enabler of economic growth. The Government's goal is to support a vibrant communications environment that provides high quality and affordable services for all New Zealanders, and enables our economy to grow, innovate and compete in a dynamic global environment.
- 9 The Ultra-Fast Broadband (UFB1) initiative was established in 2009 with Crown funding to accelerate the deployment of fibre-to-the-premises of 75 per cent of the New Zealand population. The UFB initiative provides UFB services of at least 100 Megabits per second (upgradable to 1 Gigabit per second) on a wholesale basis to any retail service provider (RSP) within the coverage area.
- 10 The Crown-owned company Crown Fibre Holdings (CFH) was established to manage the tender, contracts and implementation of UFB1 deployment. The total coverage area for the UFB was divided into 33 candidate areas, and tenders were let for the provision of UFB infrastructure. The Crown invests in UFB via CFH through partnerships with Chorus (New Zealand's national communications infrastructure owner and operator of the existing copper telephone network) and three local fibre companies (UFB1 participants). The partnership with Chorus is the largest, at 69% coverage of the UFB1 candidate areas. Implementation began in 2010, and the UFB1 rollout reached the halfway point in 2015.
- 11 In the 2014 Speech from the Throne, the Government indicated its intention to continue its programme of investment in modern infrastructure. Specifically, the Government indicated that the UFB programme would be extended to reach at least 80 per cent of New Zealanders, with the exact coverage of the extension to the UFB programme (UFB2) to be determined following the gathering of additional information from the market and stakeholders. It is intended for the UFB2 programme to maintain the same technical specifications and open access obligations as the UFB1 programme. Consistency with UFB1 is critical in order to maximise the number of retailers selling UFB services nationally.

## Status Quo and Problem Definition

- 12 Given the nature of the UFB network, it is likely that UFB providers will have natural monopolies in their respective areas. The network has very high capacity and will provide all the fixed-line communications capability needed in the foreseeable future. It is unlikely that the UFB network will be 'overbuilt' by a competing national network.
- 13 Accordingly, the Government has built regulatory and contract-based competition safeguards into the UFB structure. The UFB1 was designed to manage any competition issues in wholesale markets, and to promote competition in retail markets. The safeguards included are:
  - a. UFB providers must be wholesale only, pursuant to the Telecommunications Act. They must not sell services to end users (this is an enduring obligation, enforced by the Commerce Commission);
  - b. UFB services have price caps set out in contracts with CFH (effectively capping the maximum prices for UFB services and preventing anti-competitive monopoly pricing); and
  - c. there are non-discrimination and equivalence of inputs obligations contained in the deeds of undertaking that relate to all UFB services (effectively protecting against non-price forms of anti-competitive behaviour), enforced by the Commerce Commission.

- 14 MBIE has no evidence to suggest that these safeguards are not working. The Commerce Commission has not raised any significant concerns within this environment to date.
- 15 The design of the legislation for UFB1 is limited to the UFB1 project only. Therefore, extending the existing structure and safeguards to UFB2 participants will require legislative change.
- 16 This RIS addresses three regulatory issues for UFB2:
  - a. **Issue One:** The requirement for deeds of undertaking to be signed by UFB2 participants relating to open access to the UFB network; and
  - b. **Issue Two:** The requirement for information disclosure by UFB2 participants to the Commerce Commission relating to the costs and characteristics of their services and the UFB2 network build cost; and
  - c. **Issue Three:** Provision of a statutory authorisation under the Commerce Act for potential partnering arrangements between Chorus and the Crown that may emerge from the UFB2 tender process;
- 17 These are discussed below.

### **Issue One: Open access undertakings**

- 18 A core safeguard built into the UFB programme, and a general requirement of the wider telecommunications regulatory regime, is that all government-funded communications infrastructure should be subject to open access requirements. Essentially, this means that Chorus and UFB participants must treat all their customers (Retail Service Providers or RSPs) in a 'non-discriminatory' or 'equivalence of inputs' manner. This means they cannot treat RSPs differently (including charging different prices) based on size or other characteristics. Open access safeguards against anti-competitive behaviour by UFB participants.
- 19 The absence of open access requirements would have significant potential to harm competition in wholesale and retail markets. Absence of open access requirements would be problematic because, as noted earlier, UFB2 participants will have natural monopolies in their areas (similar to electricity lines companies). This means that there will be the incentive and the ability to behave anti-competitively through price and non-price terms. For example, UFB participants may choose to charge lower prices to larger RSPs for higher volumes of traffic (volume discounting), which would be likely to have the effect of entrenching the dominant position of larger RSPs in the retail market. These forms of behaviour are prohibited under the open access deeds of undertaking. The deeds are monitored and enforced by the Commerce Commission.
- 20 The problem is that, without legislation establishing these open access requirements, the requirements would not be sufficiently binding or effective. The open access provisions are regulatory in nature and are intended to be permanent, meaning that they cannot be provided for in contracts between CFH and UFB participants, which are finite. Additionally, if the Commerce Commission is to monitor and enforce compliance with open access requirements, this needs to be set out in legislation.
- 21 This problem was addressed in UFB1 through an amendment to the Telecommunications Act 2001, requiring UFB participants to sign deeds of undertaking relating to open access.
- 22 The deeds of undertaking entered into by UFB1 participants will remain valid for any involvement in UFB2 (if any UFB1 partners are selected for UFB2). However, if there are any new participants in UFB2 – and MBIE considers that there is a reasonable chance that there will be – these will not be bound by existing deeds.

## **Issue Two: Information disclosure**

- 23 Another important requirement under UFB1 is for the participants to provide information annually to the Commerce Commission on the costs and characteristics of services and their UFB network builds. This information will be of significant value if and when the UFB participants are regulated by the Commerce Commission in the future. It will avoid disputes and debates about costs that make up regulated prices.
- 24 Currently, the maximum price that Chorus (the owner of the nationwide copper network) can charge RSPs for services on the copper network is regulated by the Commerce Commission. UFB is not yet subject to such regulation, although maximum prices for UFB wholesale services are set in the UFB contracts between CFH and UFB participants. While wholesale UFB services are not regulated at present, they are likely to become subject to some form of regulation in the long term (as UFB providers will develop monopolies). As part of developing any such regulation, the Commerce Commission will need to understand the costs faced by UFB participants in establishing and maintaining the UFB network.
- 25 The problem is that, without such information, there are usually significant issues at the time of developing new regulation, because there are often disagreements and debate between the Commerce Commission and potentially regulated parties about what costs were incurred in building the potentially regulated infrastructure. These disagreements and debates are usually highly complex and can take some time to resolve, involving significant industry time and resources. If a lack of information (or a lack of agreement on relevant information) results in the regulated price being set too high, this could increase the costs paid by consumers, and result in windfall profits to UFB participants. If the price is set too low, this could impact on the ability of UFB participants to viably operate and continue to invest in the UFB network.
- 26 This problem cannot be sufficiently addressed through contracting, because information disclosure requirements extend beyond the build period to also cover the incremental investment and ongoing maintenance of the UFB network after completion of the initial build. Any information disclosure requirements established in a contract would not extend to these costs.
- 27 This problem was addressed in UFB1 through an amendment to the Telecommunications Act 2001, requiring UFB participants to provide information annually to the Commerce Commission about the costs and characteristics of services and their UFB network builds. While the information disclosure requirements placed on UFB1 participants will extend to UFB2 (if any UFB1 partners are selected for UFB2), any new participants under UFB2 will not be bound by existing disclosure requirements.

## **Issue Three: Statutory authorisation of partnering arrangements**

- 28 The third issue relates to ensuring that the Government has the full set of options available to it from the UFB2 tender process. This issue relates to a hypothetical scenario arising out of the UFB2 tender process where:
  - a. Chorus is a successful bidder in one or more of the UFB2 coverage areas, and enters into an arrangement with CFH to build a UFB network in these coverage areas; and
  - b. CFH had also received an alternative bid for the same coverage areas which would have provided independent competition to Chorus' existing copper network in those coverage areas.

- 29 In this scenario, even though Chorus may fully comply with the tender requirements and be the best party to select for the given coverage area(s), there is a risk that a third party could launch strategic litigation under the Commerce Act. Legal advice has indicated that if challenged, a Court might consider the selection of Chorus as a UFB2 participant and any subsequent contract based on that selection to have the effect of substantially lessening competition in a market. This may constitute a breach of the Commerce Act – the reasoning would be that selecting the alternative bid in the above hypothetical scenario would have generated substantially greater infrastructure competition than selecting Chorus' bid.<sup>1</sup>
- 30 Even though there is significant public benefit from the availability of UFB services and there are competitive safeguards built into the UFB programme, case law suggests that it is unclear the extent to which the Court can take into account these wider benefits. A Court may therefore take a narrow approach and focus only on the effects of the arrangement on the relevant wholesale market without looking at the benefits in retail markets, or the wider public benefit.
- 31 As noted earlier, there are safeguards built into the UFB programme. UFB2 contracts will require partners to be wholesale only, and subject to rigorous open access requirements (see Issue One). The experience of the UFB1 programme is that the open access, wholesale-only services which Chorus and the other UFB participants provide has been associated with significant retail competition.
- 32 In addition, maximum wholesale fibre prices will be set in contracts between CFH and Chorus/UFB participants for the entire build period, and wholesalers are likely to be subject to some form of regulation after that (see Issue Two). The maximum prices set out in UFB2 contracts will be set at levels consistent with the lowest current market price for relevant UFB1 services. This will constrain monopoly pricing.
- 33 These safeguards should ensure that even where infrastructure competition is not promoted, outcomes consistent with competition will be.
- 34 While the legal advice indicates that the risk of a breach of the Commerce Act is low, it nevertheless suggests that the risk is high enough to permit a legal challenge to UFB2 on this basis. If the selection of Chorus was challenged, an injunction, ongoing litigation, or a request to the Commerce Commission to investigate whether there is a breach could result in significant uncertainty, cost and delay for both the Crown and Chorus. This would have the potential to delay the rollout of UFB2 infrastructure, and its associated economic and social benefits, significantly. Therefore, while this situation may or may not eventuate, it is important that the Government has the option of selecting Chorus if Chorus best meets the tender requirements for UFB2.
- 35 This problem was addressed in UFB1 in relation to Telecom being selected through an amendment to the Telecommunications Act 2001, which introduced a statutory authorisation for partnering arrangements between the Crown and Chorus (then Telecom) for the purposes of the UFB rollout (Telecom then structurally separated and Chorus participated in UFB1).

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<sup>1</sup> Such a view hinges on the assumption that copper and fibre-based internet are part of the same market. While copper and fibre-based internet may currently represent similar products, over time the average speeds offered by fibre services are likely to increase, while copper-based services are unlikely to improve as much. Therefore, fibre and copper-based internet products could be viewed as eventually diverging into separate markets.

## Objectives

- 36 The overarching objective of the UFB2 programme is to support economic growth and social benefits through the provision of infrastructure that facilitates the delivery of ultra-fast broadband to at least an additional five per cent of New Zealanders, taking the total to at least 80 per cent.
- 37 It is critical for the success of the UFB2 programme for there to be consistency with the regulatory and commercial arrangements established under UFB1. Therefore, the primary criteria by which the policy objectives contained in this RIS are to be considered are whether they:
- a. are consistent with the approach taken under UFB1, and
  - b. provide certainty as to the rollout of the UFB2 programme.
- 38 In addition, there is a third criterion with lower weighting:
- a. supports outcomes consistent with competition in the telecommunications sector.
- 39 This has a lower weighting because we have confidence in the existing settings to produce outcomes consistent with competition. As noted above, various safeguards have been put in place to support this. Because of this, we have not undertaken a full-scale competition analysis at the wholesale level and accordingly our analysis of this criterion is high-level.

## Options and impact analysis

Key:	
✓✓	Significant improvement relative to the status quo
✓	Improvement relative to the status quo
—	No change relative to status quo
✗	Deterioration relative to the status quo
✗✗	Significant deterioration relative to the status quo

## Issue One: Open access undertakings

	Is consistent with the approach taken under UFB1	Provides certainty as to the rollout of the UFB2 programme	Supports outcomes consistent with competition in the telecommunications sector	Net impact
<b>Option One: Do not require open access undertakings from new UFB2 partners (Status Quo)</b>	Is not consistent with the approach taken under UFB1.	Does not directly impact upon the rollout of UFB2.	Not consistent with supporting retail competition in the telecommunications sector. Could result in UFB participants discriminating against RSPs, such as charging lower prices to larger RSPs for higher volumes of traffic, which could entrench the dominant position of larger RSPs in the market, potentially harming retail competition and thus outcomes for consumers. Could also result in vertical re-integration by UFB participants.	Negative. Could result in discriminatory treatment of RSPs, leading to reduced competition and poor outcomes for consumers. This outweighs the benefit of UFB participants having more freedom in their commercial arrangements.
<b>Option Two: Require open access undertakings from new UFB2 partners (Preferred option)</b>	✓✓ Is consistent with the approach taken under UFB1.	– Does not directly impact upon the rollout of UFB2.	✓✓ Supports retail competition outcomes by requiring UFB participants to treat RSPs in a non-discriminatory (and later an ‘equivalence of inputs’) manner, and allowing the Commerce Commission to monitor and enforce the open access undertakings.	Positive. Will promote competition and lower prices for consumers. This outweighs costs the UFB participants of being restricted in their commercial arrangements.

### Option One: Do not require open access undertakings from new UFB2 partners (Status quo)

40 Under this option, the Crown would not require open access undertakings from new UFB2 partners. Existing open access requirements would still apply to any established UFB1 participants if they won contracts for UFB2 areas. However, any new UFB2 participants would not be subject to these open access requirements.

#### Benefits

41 The main benefit of this option would be that any new UFB2 participant would not be restricted in the structure of their commercial arrangements with RSPs (outside of existing restrictions in the Commerce Act). For example, UFB2 participants could choose to charge larger RSPs lower prices, based on the higher volumes of traffic. This might have benefits in terms of efficiency for the UFB2 participants, and in terms of wholesale prices for the larger RSPs.

#### Costs

42 The main cost of this option is that if UFB2 participants chose to discriminate, such as by charging lower prices to larger RSPs for higher volumes of traffic, this could serve to entrench the dominant position of larger RSPs in the retail market. If smaller RSPs are unable to compete in the UFB2 coverage areas due to their higher input costs, then larger RSPs will face less competition, and consumers in UFB2 areas may face higher prices for fibre broadband.

43 This option also has the cost of being inconsistent with the approach taken under UFB1, presenting an uneven playing-field between the UFB1 and any UFB2 participants in terms of the requirements placed on them. UFB2 participants could also choose to vertically re-



integrate in contravention of UFB policy, leading to the ability to dominate and act anti-competitively in both retail and wholesale markets.

### **Option Two: Require open access undertakings from new UFB2 partners (preferred option)**

44 Under this option, an amendment would be made to the Telecommunications Act, requiring any new UFB2 participants to submit a deed of undertaking to the Commerce Commission, setting out the open access arrangements under which they will provide services to all RSPs. These obligations would be monitored and enforced by the Commission. Existing open access requirements would continue to apply to any established UFB1 participants if they were selected for UFB2 areas.

#### ***Benefits***

- 45 The main benefit of this option is that UFB participants would be required to treat RSPs in a non-discriminatory manner.<sup>2</sup> This means they would not be able to treat RSPs differently (including charging different prices) based on size or other characteristics. This would serve to promote competition among RSPs, by placing all RSPs on a level playing-field. This has the potential to benefit consumers in UFB2 areas in the form of lower fibre broadband prices.
- 46 This option also has the advantage of consistency with the approach taken in UFB1. This approach has been associated with a significant increase in the number of competitors in the retail market.<sup>3</sup> There are also many other open access obligations in the deeds that would support competitive outcomes in retail markets.

#### ***Costs***

- 47 The main cost of this option is that it would restrict the freedom in which new UFB2 participants could structure their commercial arrangements with RSPs. By not being able to charge higher prices to smaller RSPs based on lower traffic volumes, or otherwise alter their business models in a way that would be seen to discriminate, UFB participants could be limited in their ability to operate efficiently.
- 48 However, these costs would only be borne by UFB participants that voluntarily entered into contracts for the rollout of UFB2. Furthermore, these costs would be minimised because discrimination would be allowed under certain circumstances. This flexibility would narrowly limit the regime's potential to hinder innovation.
- 49 Under this option, RSPs that might have benefited from discrimination by UFB participants (such as through lower wholesale prices or better service) will not do so. Similarly, consumers will not receive any benefit that may have been passed on. However, these foregone benefits are likely to be small, and outweighed by the benefits associated with stronger competition in the retail market.
- 50 The Commerce Commission will also face costs in monitoring and enforcing the deeds of undertaking. The Commission already enforces the deeds of undertaking in respect to UFB1, and the additional costs are not expected to be significant.

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<sup>2</sup> And later in an 'equivalence of inputs' manner.

<sup>3</sup> While assessing the counterfactual is difficult, as of June 2015, 87 retail providers are actively offering UFB services (up from 13 in June 2012). The Commerce Commission has stated that the retail market is highly competitive.

## Conclusion and recommendation

51 Based on this analysis, and drawing from experience to date with the rollout of UFB1, MBIE’s preferred option is Option Two. Our view is that the benefits of open access undertakings, including on competition and consumer welfare, significantly outweigh the (voluntary) cost faced by UFB participants.

## Issue Two: Information disclosure

	Is consistent with the approach taken under UFB1	Provides certainty as to the rollout of the UFB2 programme	Supports outcomes consistent with competition in the telecommunications sector	Net impact
<b>Option One: Do not require information disclosure from new UFB2 partners to the Commerce Commission (Status Quo)</b>	Is not consistent with the approach taken under UFB1.	Does not directly impact upon the rollout of UFB2.	In the event that the UFB network is regulated in the future, a lack of information disclosure at the time of the UFB2 network build could result in prices being set too high, which would not be an outcome consistent with competition in the sector.	Negative. Benefit to UFB participants in not needing to provide information to the Commerce Commission is outweighed by the poor outcomes that could result if fibre is regulated in the future based on inaccurate or estimated information. Not providing the information would not be in the long term interests of UFB participants.
<b>Option Two: Require information disclosure from new UFB2 partners to the Commerce Commission (Preferred option)</b>	✓✓ Is consistent with the approach taken under UFB1.	– Does not directly impact upon the rollout of UFB2.	✓✓ In the event that the UFB network is regulated in the future, the provision of information to the Commerce Commission about the cost of the UFB2 network should lead to more agreement about the appropriate wholesale price for fibre, leading to pricing outcomes that are consistent with competition.	Positive. Costs to UFB participants of needing to provide information to the Commerce Commission are outweighed by the benefit of any potential future regulation of fibre being better-informed and subject to less disagreement. Providing the information would be in the UFB participants’ long-term interest.

### Option One: Do not require information disclosure from new UFB2 partners to the Commerce Commission (Status quo)

52 Under this option, new UFB2 participants would not be required to disclose information about the costs and characteristics of services and their UFB network builds to the Commerce Commission. Existing information disclosure requirements would still apply to established UFB1 participants that won contracts for UFB2 areas. The government would retain the option to regulate the fibre network in the future, albeit without the information.

### Benefits

53 The main benefit of this option is that it means that UFB participants will not need to capture the information about the costs of the UFB build. This would reduce costs for UFB participants.

## **Costs**

- 54 As shown by the experience of the Commerce Commission in setting the price of copper services in recent years, there is likely to be significant administrative cost and time associated with trying to approximate the information after the network has been built.
- 55 If the government regulates the UFB network in the future, and a lack of information (or a lack of agreement on the information) results in the regulated price being set too high, this could increase the costs paid by consumers. There could also be costs if the price is set too low, as this could impact on the ability of UFB participants to viably operate and continue to invest in the UFB network.
- 56 This option also has the cost of being inconsistent with the approach taken under UFB1. This could result in an uneven playing-field between UFB participants if the lack of information relating to the cost of building and operating the UFB network led to some UFB participants being allowed to charge higher prices than others (when in fact their costs were equivalent).

## **Option Two: Require information disclosure from new UFB2 partners to the Commerce Commission (preferred option)**

- 57 Under this option, an amendment will be made to the Telecommunications Act, requiring any new UFB2 partners to provide information annually to the Commerce Commission about the costs and characteristics of services and their UFB2 network builds. Existing information disclosure requirements would continue to apply to established UFB1 participants that were selected for UFB2 areas.

## **Benefits**

- 58 This option provides a one-time opportunity for the Commerce Commission to collect information from the UFB participants as they build the network. By providing the Commission with information about the cost of building the UFB network at the time it is built, the potential for argument later about these costs if and when the UFB network is regulated should be reduced.
- 59 This option also has the benefit of consistency with the approach taken under UFB1. MBIE understands that this approach has been effective in terms of providing the Commission with the information it needs to monitor the market and will be useful if and when the Commission needs to make a decision regarding regulation in the future.
- 60 UFB participants and RSPs have the potential to benefit from this information disclosure over the long-term. UFB participants will benefit in the event that UFB services are regulated because they will have a more reliable set of evidence to base arguments on about regulation. This makes it less likely that the price of fibre would be set too low for UFB participants to viably operate. RSPs (and consumers) will benefit through greater certainty that the wholesale fibre price they are paying is 'fair'.

## **Costs**

- 61 The main cost of the information disclosure regime is that new UFB2 participants will need to capture in their systems the information required and provide it to the Commerce Commission. The costs to UFB participants to capture the information required depend on the extent to which they need to re-engineer existing information systems. As new entrant UFB2 participants will be new businesses, this cost should be lower than otherwise because they will be able to require the capture of this information during their system

development process (and any existing UFB1 participant will already be collecting the information).

62 MBIE has not attempted to quantify this cost, however it would only be borne by parties voluntarily entering into contracts for the rollout of UFB2. The Commerce Commission would also have the discretion to provide flexibility in relation to information disclosure requirements in the early phase of the build process, as it has done in UFB1, which would reduce costs.

63 The Commerce Commission would also face costs in terms of collecting, collating and analysing the information provided. This cost should not be significant, given the economies of scale provided by the Commission’s existing information disclosure regimes.

### Conclusion and recommendation

64 Based on this analysis, and drawing from experience to date with the rollout of UFB1, MBIE’s preferred option is Option Two. Our view is that the benefits of information disclosure, in terms of a more reliable set of evidence to base any future regulation of the fibre network on, far outweigh the (voluntary) costs to UFB participants of providing the information to the Commerce Commission.

## Issue Three: Statutory authorisation of partnering arrangements

	Is consistent with the approach taken under UFB1	Provides certainty as to the rollout of the UFB2 programme	Supports outcomes consistent with competition in the telecommunications sector	Net impact
<b>Option One: Do Nothing (Status Quo)</b>	Is not consistent with the approach taken under UFB1.	Does not provide certainty due to the threat of legal challenge.	Would allow for any non-competitive outcomes to be challenged.	Likely negative, as there is a potential for significant cost and delay in the rollout of UFB2, which outweighs the benefit of allowing for non-competitive wholesale outcomes to be challenged.
<b>Option Two: Seek Commerce Commission authorisation for partnering arrangements</b>	– Is not consistent with the approach taken under UFB1.	✓ A successful application for authorisation would provide some certainty, but it is uncertain as to whether the Commission would authorise the arrangement, the process would take some time, and a third party could still appeal the outcome to the Court.	✓ In addition to numerous safeguards in the UFB regime designed to promote retail competition, this option also allows for the Commerce Commission to explicitly assess the impacts of the arrangements on wholesale competition.	Unclear, as depends on the outcome of an application to the Commerce Commission and any potential litigation.
<b>Option Three: Provide for statutory authorisation for partnership arrangements</b>	✓✓ Is consistent with the approach taken under UFB1.	✓✓ Provides certainty as to the legality of any arrangement, allowing for the rollout of UFB2. No	✗ This option prevents the effects on competition from being challenged in the Courts or explicitly being assessed by the Commerce Commission. However, we are confident any potential	Likely positive, as risks to wholesale competition are small given the safeguards, and are likely to be significantly outweighed by the benefit of the timely

(Preferred option)	risk of litigation.	lessening of wholesale competition would be mitigated by the safeguards built into the UFB programme.	deployment of UFB2.
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### Option One: Do nothing (Status quo)

65 Under this option, the Crown would choose to enter into contractual arrangements with Chorus for the rollout of UFB2, but would take the risk of a challenge to Chorus’ partnership with the Crown.

#### **Benefits**

66 If Chorus meets the overall criteria better than other bidders, it clearly presents benefits, as the Crown will be able to obtain better outcomes for consumers with available funds. If no challenge is made, this option has the advantage of the process continuing at no additional cost.

#### **Costs**

- 67 This option has the cost of being inconsistent with the approach taken under UFB1. Additionally, if a challenge is made, litigation would add uncertainty, cost and delay to the UFB2 process, and Chorus would be at risk of liability for damages. The Crown may also be liable for damages if it was considered to be acting “in trade”.
- 68 While legal advice indicates that the Courts would be unlikely to find any arrangement between Chorus and the Crown to be a breach of the Commerce Act, MBIE’s understanding is that, because of the significant sums of money at stake in the UFB2 rollout (up to \$210 million), there is nevertheless significant risk of a legal challenge by one of Chorus’ competitors in the tender process. Therefore, there is also the cost in that the social and economic benefits associated with the rollout of UFB2 could be delayed in some areas, potentially for several years.

### Option Two: Seek Commerce Commission authorisation for partnering arrangements

69 Under this option, the Crown would apply to the Commerce Commission for authorisation of any partnership with Chorus.

#### **Benefits**

70 If Chorus meets the overall criteria better than other bidders, it clearly presents benefits, as the Crown will be able to obtain better results for consumers with available funds. If the authorisation is granted, this would remove some uncertainty as to the legality of the partnering arrangement. However, arrangements that receive Commerce Commission authorisation can be appealed in the Courts by stakeholders that were part of any conference called by the Commission to consider the application.

#### **Costs**

- 71 This option has the cost of being inconsistent with the approach taken under UFB1.
- 72 The other main cost is that the possibility of appeals to the High Court against a decision to approve an authorisation has the potential to significantly extend the timeline for resolution of these issues. The possibility of a private prosecution would also be present. Therefore, this option could significantly affect the timeframe for delivery of UFB2, delaying the economic and social benefits associated with UFB2.

73 There is also a (relatively low) risk that the Commission would choose not to grant an authorisation, in which case the costs would be the same as under Option One.

### **Option Three: Provide for statutory authorisation through the Telecommunications Act 2001 (preferred option)**

74 Under this option, an amendment would be made to the Telecommunications Act, authorising any contract, arrangement, or understanding between the Crown and Chorus that is necessary to give effect to the selection of Chorus as a UFB participant in a particular region for the UFB2 programme. Due to the potential for UFB2 contracts to be signed prior to legislation being passed, this amendment would apply retrospectively to the date of contracts being signed.

#### ***Benefits***

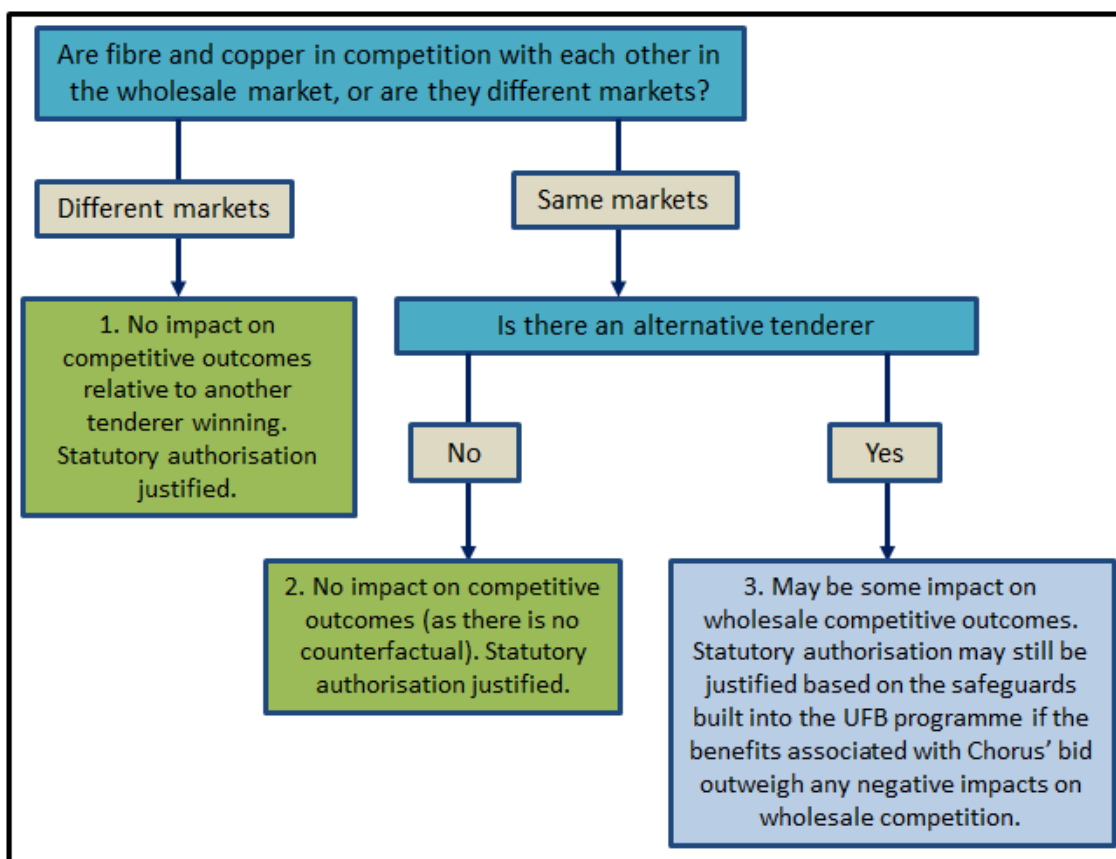
75 If Chorus meets the overall criteria better than other bidders, it clearly presents benefits, as the Crown will be able to obtain better results for consumers with available funds. This option avoids process costs and delays associated with an application for authorisation from the Commerce Commission. More importantly, it also avoids the risk of litigation from third parties, which would delay the rollout of UFB2 infrastructure. This option therefore allows for the most efficient outcome of the bidding process to stand without challenge or delay.

76 This option also has the benefit of consistency with the approach taken under UFB1. At a high level, this appears to have been successful at achieving its objectives.

#### ***Costs***

77 The main cost of this option is that it does not make use of the Commerce Commission's authorisation process and therefore a full competition analysis has not been carried out. Whether this will impact on competition (and thus on outcomes for consumers) depends on a number of variables outlined in Figure One (below).

**Figure One: Will an arrangement between Chorus and the Crown reduce wholesale competition?**



78 As noted above, we have not undertaken a full competition analysis. However, as shown in Figure One, in two of three possible outcomes, there is likely to be no impact on wholesale competition either due to:

- a. there being no alternative tenderer (and thus no counterfactual in which wholesale competition is higher); and/or
- b. fibre and copper broadband not being considered to be in the same market as each other (particularly as the speed of fibre services offered by RSPs increases); or

79 If scenario 3 eventuates, MBIE is confident that the design of the UFB programme (in particular the price caps and any eventual regulation of UFB by the Commerce Commission) will safeguard against any anti-competitive behaviour.

### Conclusion and recommendation

80 Based on this analysis, and drawing from experience to date with the rollout of UFB1, MBIE's preferred option is Option Three. This option is consistent with the approach taken under UFB1. It would eliminate the risk of strategic litigation by third parties which, regardless of the legal outcome, could cause significant cost and delay to the UFB process. We believe there is a high risk of such litigation if no statutory authorisation is in place.

81 MBIE considers it to be unlikely that an arrangement between Chorus and CFH would reduce infrastructure competition. If it did, MBIE is confident that the safeguards would promote outcomes consistent with competition. Furthermore, a contract would only be entered into with Chorus if CFH considered that the benefits associated with Chorus' bid (compared to any bid by a third party) outweighed any potential gains from wholesale

competition. Therefore, MBIE considers that the benefits of Option Three outweigh the costs.

## Consultation

- 82 MBIE has consulted with Treasury and the Commerce Commission on these proposals. Neither the Commerce Commission nor Treasury had any comment.
- 83 MBIE has not carried out any formal consultation on these proposals; however notes that they are the same as those for the UFB1 programme, which has been in place for four years. Over that time, MBIE has had contact with parties in the industry and wider stakeholders that would potentially be affected by the arrangements. In particular, MBIE has met regularly with the Telecommunications Forum, major industry participants (including both network owners and retailers) and user groups (Internet NZ, TUANZ and Consumer NZ). Electricity lines companies are another group potentially affected (as they may choose to participate in the UFB2 tender process) however the majority of these companies were involved in the UFB1 programme and therefore are aware of the regulatory requirements. No significant concerns have been raised by these groups in relation to the equivalent regulatory settings that are addressed in this RIS.

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### **] COMMERCIAL IN CONFIDENCE**

- 85 On this basis we are satisfied that potentially affected parties have had a reasonable opportunity to raise any significant concerns, and have not done so.

## Implementation

- 86 Assuming MBIE's preferred options are chosen, legislative amendments will be inserted into the Telecommunications (International Mobile Roaming and other Matters) Bill. This Bill is yet to be introduced into the House, and can be expected to be passed late in 2016. This is likely to be after the contracts for UFB2 have been signed. However the amendments are intended to be retrospective to the date of contracts being signed, meaning that this timing is not an issue.
- 87 The amendments are likely to be introduced in such a way that they only apply to the UFB2 contracts.
- 88 With regard to statutory authorisation, it is unclear as to whether Chorus would begin its UFB2 rollout upon signing a contract with CFH, or whether it would wait until the authorising legislation had taken effect. Under the former scenario, there is a risk that third parties could challenge any partnering arrangements between CFH and Chorus in between the time that contracts are signed and the legislation is passed. However, MBIE understands that the Courts are unlikely to hear any challenge where legislation is in the process of being passed.
- 89 There is a risk that the statutory authorisation could be specified too broadly or too narrowly, or that the scope of the requirements set out in the deeds of undertaking is too wide. These risks will be addressed by modelling the authorisation and the deeds of undertaking on those established for UFB1. As noted above, there is no evidence of competitive pressure having reduced as a result of the statutory authorisation.
- 90 To account for the gap between the signing of contracts and the passing of legislation, deeds of undertaking will be required as part of any contract signed between CFH and UFB



participants. These deeds will be given ongoing legal force once the amendments to the Telecommunications Act are passed.

- 91 In terms of information provision to the Commerce Commission, any new UFB participants will need to design information systems allowing them to capture the required information. To account for the gap between the signing of contracts and the passage of legislation, this will be required as part of the contract signed between CFH and UFB participants. This will be given ongoing legal force once the amendments to the Telecommunications Act are passed.

## **Monitoring, evaluation and review**

- 92 Experience with the equivalent amendments made under UFB1 has informed the proposals set out in this RIS. As noted throughout the document, the available evidence suggests that these amendments have been effective at achieving the objectives of the UFB programme. MBIE will continue to closely monitor the UFB rollout, including through producing quarterly progress updates regarding coverage and uptake.
- 93 Under the existing Telecommunications Act, the Commerce Commission has monitoring functions that enable it to monitor and report on industry investment and developments, competition and prices. These functions are fundamentally supported and enhanced by the proposal for UFB participants to provide information to the Commission about the costs and characteristics of services and their UFB network builds.