

UFB: the proposed 10 year regulatory forbearance period and WTO/APEC requirements

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1. Summary

Introduction

- 1.1 We have been asked by InternetNZ to advise whether the proposed UFB 10 year regulatory forbearance period – to be implemented by legislation – complies with New Zealand's international WTO and APEC obligations.

- 1.2 Government intends to legislate to remove the ability of the Commission to seek the addition of UFB services under the Telecommunications Act (that is, the Layer 1 and Layer 2 services to be wholesaled to access seekers (typically, retail Telcos and ISPs)). This means that, for 10 years, those UFB services cannot have price and non-price terms determined by the Commission. They will be fixed by contract, which is not subject to regulatory overview.
- 1.3 In the same legislation, the Commission will be granted new limited powers, particularly to monitor compliance with deeds of undertakings as to open access. Those deeds are to be in a form agreed between Crown Fibre and the investing partners. Those new powers are both substantially:
 - (a) less than the existing powers to seek inclusion of services in the Act, followed by the setting by the Commission of price and non-price terms; and
 - (b) different from those existing powers.
- 1.4 This advice does not consider issues beyond compliance with international WTO, GATS and APEC requirements. (For example, while there may be solutions to the issues raised, this advice is focussed on international law compliance).
- 1.5 Our advice is limited to the issue of whether the proposed legislation breaches the independent regulator requirements. It is possible that there are other breaches of obligations. However, as the UFB arrangements are being made in private, it is not possible to assess if there are further breaches, until and if details are made public.

Our advice in summary

- 1.6 It is likely that enactment of the legislation removing the Commission's powers for the 10 years, would breach New Zealand's international legal obligations pursuant to GATS. There would be no legal breach of APEC requirements, but there would be a failure to follow the relevant parts of APEC's Best Practice guidelines. That paper, called the *APEC Best Practices for Implementing the WTO Telecoms Reference Paper*, deals with GATS requirements as to independent regulators.

Reasons for conclusions

- 1.7 Principal reasons for our conclusion include:
 - (a) Legal commitments under WTO's General Agreement on Trade in Services (GATS) provide:¹

5. Independent Regulators

The regulatory body is separate from, and not accountable to, any supplier of basic telecommunications services. The decisions of and the procedures used by regulators shall be impartial to all market participants.

- (b) There must be an independent regulator for all telecommunications services.² A legislated forbearance for 10 years as to UFB services, under

¹ In the binding "Reference Paper" referred to below.

which the Commission cannot seek inclusion of the services within the Act, and then set price and non-price terms, is just the same as having no regulator at all, as to price and non-price terms for those UFB services. UFB services will increasingly be the main fixed line access service, as they replace the copper access network. Therefore this is removal of a large part of the Commission's jurisdiction, contrary to the GATS commitments. For fixed line, local access is one of the two major regulatory and competition issues (the other is interconnection).

- (c) The lesser and different powers granted to the Commission, largely to monitor deeds of undertakings agreed between parties (and not subject to usual regulatory processes), do not change this conclusion.
- (d) There are no "forbearance" rights under GATS, except in the hands of the independent regulator (the Commission).
- (e) If it is argued that the Minister, the Ministry and/or CFH constitutes the "regulatory body" for the purposes of GATS, there would still be a breach as:
 - (i) they are not a regulatory body under GATS;
 - (ii) they are not separate from suppliers of basic telecommunications services, namely, the Local Fibre Companies (and Government itself and/or CFH). Government has a substantial role in relation to UFB, as co-owner via CFH, investor via CFH, equal representation on the LFCs' boards along with the investing partner for the 10 years, and the design and selection of the UFB/LFC structures, etc;
 - (iii) they are "accountable" to suppliers of basic telecommunications services (for example they have funding obligations as to the LFCs); and
 - (iv) adopting the words of the GATS requirement, "The decisions of and the procedures used by [them are not] impartial to all market participants". For example, the `access seekers and other stakeholders have not been consulted on many issues, including the decision to have a 10 year regulatory forbearance. Further, they have conflicts of interest (and also perceived conflicts of interest, an important aspect of public sector duties) arising out of their various interests in the UFB.
- (f) Treaty obligations are interpreted in context, based on their purpose, taking into account subsequent conduct, etc. There is near ubiquitous adoption of independent regulators in OECD countries at least. The regulatory forbearance would remove that position for New Zealand given the large carve-out.
- (g) The context includes New Zealand's involvement in and support of the *APEC Best Practices for Implementing the WTO Telecoms Reference Paper*. While, in common with APEC general practice, the Best Practice document is not binding:

² It may be arguable that certain higher-end, value-add services are not subject to the requirement for an independent regulator but this does not apply to services such as UFB services.

- (i) by enabling the forbearance, the legislation would be contrary to much of the APEC *Best Practices for Implementing the WTO Telecoms Reference Paper*, and
 - (ii) that document is relevant to interpretation of New Zealand's GATS obligations.
- (h) As APEC states, the key principles for independent regulation are:
- transparency and objectivity, in other words, "Hear the other side" and "don't be a judge in your own cause".
- (i) Even if it can be argued that Government is the "independent regulator", Government decided on this 10 year regulatory holiday without consulting stakeholders (it did not "*hear the other side*").
 - (j) Government has a personal interest in the network, breaching the "*don't be a judge in your own cause*" obligation.

Government's Reasons for a regulatory holiday

- 1.8 Government give four main reasons for the regulatory forbearance:
- (a) the contract between CFH and the investing partners acts as "regulation";
 - (b) giving investors certainty;
 - (c) the price of wholesale services over the existing copper network will act as a competitive constraint on the price of UFB fibre services; and
 - (d) new NGN services call for a new not a legacy regulatory model.
- 1.9 Whatever the merits of these views, none overcomes the breach of the GATS requirements. For example, an independent regulator such as the Commission might, in some instances, adopt "regulation" by contract, and that would be compliant with GATS. However, that is not something that a party other than the Commission can do, particularly Government and/or CFH.
- 1.10 An independent regulator such as the Commission can, and does, consider those 4 issues when deciding on what course to take.

Overview of this opinion

- 1.11 We will outline the issues as follows (it is necessary, to enable proper interpretation of the position and the GATS obligations, to set out context):
- (a) The UFB structure
 - (b) Regulation assuming no amendment
 - (c) Impact if legislation amended
 - (d) Overview of the GATS agreements
 - (e) The context, including the context as to the Reference Paper
 - (f) APEC Best Practice

- (g) Independent Regulator obligations under GATS
- (h) Conclusion

2. The structure of the UFB initiative

- 2.1 Government is investing \$1.35Bn in UFB via its wholly owned company, Crown Fibre Holdings (CFH).
- 2.2 Local Fibre Companies (LFCs) will develop and operate the new fibre networks in each region. Shareholding in the LFCs is held by CFH and the investing Partner. The Partner enters a contract to develop the network. Funds are invested in the LFCs by CFH.
- 2.3 All going well, in due course the Partner takes full ownership of the LFC, CFH retaining a share to ensure continued open access etc.
- 2.4 However, for the first 10 years (that is, the concession period, which is the 10 year regulatory holiday, more or less), each of CFH and the Partner have three directors on the LFC board with an independent chairman. This does not change, regardless of shareholding, the stage of development of the services and networks, etc.
- 2.5 CFH is running an RFP (called an ITP) process to choose the partner. This was commenced before CFH came into existence. Therefore, MED designed and released the first ITP. While there have been major changes since that first ITP (in particular the move from Layer 1 to Layer 2):
 - (a) Many of the terms and requirements in the initial design by MED continue to apply.
 - (b) The ITP, including as amended by CFH, but with close input from MED, closely defines details, including details of the network, the approach to price and non-price terms for LFC services, etc.
 - (c) The outcome of the ITP process will include price and non-price terms agreed between CFH, Government and Partners, in relation to the LFC Layer 1 and Layer 2 services to be supplied to access seekers. Access seekers and other stakeholders are largely excluded (but not fully) from setting the price and non-price terms for the LFC services. For example, CFH has drafted a standard form of agreement with access seekers which has not been seen by 'access seekers. There is also a deed of undertaking as to non-discrimination, etc, not seen by access seekers and other stakeholders.
 - (d) Government has been closely involved in the changes and subsequent developments and is inevitably closely involved in the wider aspects including the legislation to introduce the 10 year forbearance and the Commission's monitoring role.
 - (e) CFH, funded by Government, will of course enter binding commitments to the LFC and the Partner as to issues such as funding, shareholding, and so on.
 - (f) The Minister must sign off on the selection of partners, etc.

- (g) In any event, CFH, wholly owned by Government is part of the machinery of Government (and, as noted below, cannot for present purposes be regarded as functionally or practically separate from government). Similarly, Government and CFH have a strong interest in the LFCs in a number of respects ranging from ownership, board control (equal with the partner) and investment obligations.
 - (h) While mass market UFB is likely to be rolled out largely in Years 5 to 10, the initial years see substantial developments such as prioritisation of Layer 1 and Layer 2 services for business, hospitals, etc. Issues in the near-term arise.
- 2.6 Taking all these issues into account, the various public sector parties have multi-faceted and overlapping relationships and involvement in the UFB initiative. As we note below, GATS compliance is not to be determined by a technical delineation between one public sector agency and another. Substance over form is important for the treaty obligations. Further, the Reference Paper has, as a key objective, avoidance of conflicts of interest, with governments as regulators and copper network owners, now being repeated with the new fibre networks.

3. The regulatory position absent the regulatory holiday

- 3.1 To be able to assess the GATS and APEC position it is necessary to compare the position with and without the proposed legislation.
- 3.2 Assume that the proposed amendment to the Act is not passed.
- 3.3 Under the Telecommunications Act, the Commission can commence a Schedule 3 investigation as to whether one or more of the LFCs' services should be potentially subject to regulated price and non-price terms. Those services would be the LFCs' Layer 1 and 2 services provided at wholesale to access seekers.
- 3.4 The Commission makes a recommendation to the Minister as to whether to add the service/s to Schedule 1. The Minister can accept or reject that recommendation (i.e. this choice is ultimately a Ministerial, not Commission, choice).
- 3.5 If the service becomes a service within Schedule 1, as the Minister agrees that should happen, the regulator can then determine non-price and, usually, price terms as between the LFC as access provider and the access seekers.

Forbearance is an ultimate goal of regulation

- 3.6 Regulators do make forbearance decisions including decisions to remove regulation entirely. The Commission may decide to forebear from seeking to regulate LFC services. The US regulator (the Federal Communications Commission) has made that decision in relation to incumbent, Verizon's, investment in FTTP networks, for example. So has the French and Spanish regulator in relation to their incumbents' FTTP investments, although it remains to be seen whether that changes following September's EU Recommendation on regulation of next generation networks such as FTTP.
- 3.7 Forbearance of regulation is in fact the ultimate goal of the regulatory system. When the market becomes sufficiently competitive, regulation is removed. The Commission is investigating doing just that as to bitstream and resale services for example. Currently, a directly relevant example is the Commission's decision to allow forbearance of regulation for the new fibre based service, VDSL.

3.8 As to the regulatory goal of forbearance, the OECD noted in 2006:³

Almost all OECD countries have adopted a regulatory model for the telecommunication sector based on the creation of an independent regulatory authority. Sector specific regulators have often been viewed as temporary institutions created to ensure that effective competition was created in the sector. Once such competition was created regulators would forbear from regulation and over time the sector would be subject, as other industry sectors, only to oversight by the competition authority. Although telecommunication regulators have taken steps to forbear from regulation, and competition has been developing, it would be too premature to view the regulator as only a temporary institution. The development of new technologies, new services, issues such as convergence, and the implications that new voice services may have on universal service, all raise new important regulatory issues. The shift by operators to the “next generation network” may create further pressure to have a single regulatory structure which deals with electronic communications networks and services. New technological developments now allow communications services which historically were regulated differently to appear identical from the consumer point of view. This underscores the regulator’s need to be mindful not only of issues related to companies, but also with the concerns of consumers. An independent regulator with the habit of interacting and learning from consumers will have an advantageous perspective on markets as different technologies vie for new or different regulatory actions.

3.9 But that role of the regulator, and regulatory forbearance by the regulator, is different from Government taking “forbearance” action.

4. Effect of the 10 year regulatory forbearance

4.1 Assume now that the 10 year regulatory forbearance is enacted. The Commission’s ability to commence an investigation as to whether an LFC’s service should be a Schedule 1 regulated service is suspended for 10 years.⁴ The effect is that LFC services cannot be regulated under the Telecommunications Act by the Commission (after approval by the Minister) for the 10 years. This is effected simply by legislation removing the right to commence a Schedule 3 investigation.

4.2 This in turn means that the LFC services will not be capable of being subject to determination of price and non-price terms by the Commission.

New Commission powers

4.3 The same legislation is likely to enable the Commission to monitor compliance with a deed of undertaking signed by each LFC. These deeds relate particularly to open access requirements. Key points are:

- (a) Little about the deeds is publically known. Access seekers and other stakeholders are not being consulted on the controversial issues that the undertakings raise (knowledge of their contents is largely confined to a short summary in the ITP).

³ Para 4, OECD, [Telecommunication regulatory institutional structures and responsibilities](#) (2006).

⁴ Subject to some transitional provisions.

- (b) While the Commission is being consulted as to the contents of the deed, this is being done in private and does not follow normal regulatory practice with consultation, transparency, etc. Additionally, the deeds are primarily and ultimately an issue for agreement between Government, CFH and the Partners and not the Commission. Therefore the Commission's primary role is largely to monitor the undertakings as determined by other parties, its role is limited.
- (c) While there is some overlap between the deeds and the Commission's normal powers (to seek regulation of LFC services, and then set price and non-price terms), the Commission's new role is both substantially less than, and different from, the role under the existing legislation.
- (d) There is no independent regulator in the key area of UFB price and non-price terms apart from a highly limited role.

5. GATS Telecommunications Agreements

- 5.1 To be able to assess the legality of the proposed legislative amendments, it is necessary to consider GATS and APEC in some detail.
- 5.2 While often seen as one document (the GATS Basic Telecommunications Agreement) there are four key documents comprising nations' telecommunications commitments under GATS:⁵
 - (a) the General Agreement on Trade in Services (GATS);⁶
 - (b) the Annex on Telecommunications (annexed to GATS) commonly called the Basic Telecommunications Agreement or BTA;⁷
 - (c) the Reference Paper (82 WTO members have committed to the requirements of this Reference Paper including New Zealand);⁸ and
 - (d) Schedule of Telecommunications Commitments and Exceptions by each nation. (New Zealand has committed to all relevant obligations in the above documents).⁹
- 5.3 All documents are legally binding on the countries signing them (except where they have entered reservations). Obligations can be enforced at least under the WTO dispute process which can lead to enforcement against a party breaching the obligations. We have not at this stage considered direct domestic legal implications and enforceability.

6. Independent regulator requirement in the Reference Paper

Introduction

- 6.1 As noted in the Summary, we are dealing with the independent regulator requirement in the Reference Paper. While there may be other issues, we therefore focus on the Reference Paper, returning to other issues, when and if

⁵ There is a useful overview on the WTO website at: http://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_e.htm. See also Para 15.4.1 et seq in Walden (ed), Telecommunications' Law and Regulation (2009, 3rd Edition, OUP) which also describes how each document was agreed.

⁶ http://www.wto.org/english/tratop_e/serv_e/gatsintr_e.htm

⁷ http://www.wto.org/english/tratop_e/serv_e/12-tel_e.htm

⁸ http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm

⁹ http://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_commit_exempt_list_e.htm

asked to do so, particularly when information currently confidential becomes public.

Other issues?

- 6.2 For example, as access seekers and stakeholders have not seen the non-discrimination commitments (beyond the rudimentary description in the ITP), it is not known whether there is a breach of the Basic Telecommunications Agreement (BTA) commitments as to non-discrimination. As the BTA notes:

The term “non-discriminatory” is understood to refer to most-favoured-nation and national treatment as defined in the Agreement, as well as to reflect sector-specific usage of the term to mean “terms and conditions no less favourable than those accorded to any other user of like public telecommunications transport networks or services under like circumstances.

- 6.3 Similarly as to other obligations in the BTA and the Reference Paper.

Independent regulator

- 6.4 Therefore, the focus is Clause 5 of the Reference Paper, which provides:

5. Independent regulators

The regulatory body is separate from, and not accountable to, any supplier of basic telecommunications services. The decisions of and the procedures used by regulators shall be impartial with respect to all market participants.

7. Context: the Reference Paper

- 7.1 It is necessary to address the context of when the Reference Paper was conceived.
- 7.2 The Basic Telecommunications Agreement took telecommunications well beyond most over services covered by GATS. The Reference Paper marks a unique international development since then, compared to other services. It creates an international regulatory and competition framework which is enforceable against nations, at least under the WTO dispute procedure.
- 7.3 Telecommunications is a special case under the WTO framework. It was recognised by negotiators that more would be required than the terms of the GATS agreement itself. Therefore a substantially fuller competition and regulation regime was created. Additionally, domestic law as to regulation and competition does not supersede the requirements of the Reference Paper.¹⁰
- 7.4 The Reference Paper in its subtitle describes the Reference Paper as containing “*definitions and principles for the basic telecommunications services*”. It is a briefly stated international regulatory and competition framework that is legally binding.

¹⁰ This was decided in the TelMex WTO Ruling, summarised at Page 759 in Walden (ed), Telecommunications’ Law and Regulation (2009, 3rd Edition, OUP).

7.5 The ITU observes, as to the Reference Paper:¹¹

At the time the Reference Paper was conceived, most basic telecommunications services were provided by legal monopolies or state-owned operators. The Reference Paper does not prohibit the existence of such monopolies or state-owned operators, rather it requires member states to ensure that such operators do not abuse of their dominant position to the detriment of competition in the marketplace.

7.6 In her paper, *Exploring the Reference paper on Regulatory principles*, Boutheina Guerhazi notes:¹²

The reference paper was driven by the concern that free trade principles, market access and national treatment commitments are insufficient to guarantee effective competition in the basic telecommunications sector without rules to ensure that major suppliers do not abuse their position. In this respect, important elements of competition policy such as the notion of major supplier, dominance, essential facilities and competitive safeguards were introduced.

The reference paper's disciplines on major suppliers go far beyond the original GATS article VIII on monopolies and exclusive service suppliers. To a large extent, the reference paper was driven by a conviction among negotiators that GATS disciplines on monopolies are not well suited to address the concerns specific to the telecommunications sector

7.7 The Reference Paper particularly targets competition and regulatory issues related to “major suppliers” and “essential services”.

7.8 The LFCs at least, and, in context as outlined below, arguably, the Government interests behind the LFCs, are “major suppliers” and the UFB networks are “essential facilities” as defined in the Reference Paper. Therefore, networks and services in the UFB context are a key focus for the Reference Paper.

7.9 The Reference Paper defines essential facilities and major suppliers as follows:

Essential facilities mean facilities of a public telecommunications transport network or service that

(a) are exclusively or predominantly provided by a single or limited number of suppliers; and

(b) cannot feasibly be economically or technically substituted in order to provide a service.

A major supplier is a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of:

(a) control over essential facilities; or

¹¹ International Telecommunications Union's ICT Regulation Toolkit: Role of the World Trade Organisation (2010) (http://www.ictregulationtoolkit.org/en/Section.1651.html#_ftn25).

¹² www.wto.org/english/tratop_E/serv.../guerhazi_referencepaper.doc, Page 2.

- (b) use of its position in the market.
- 7.10 As to “essential facilities”, an FTTP network is unlikely to have a substitute due to the following:
- (a) Another FTTP network is economically unlikely.
 - (b) Other networks such as FTTN and LTE are not substitutes: they are complementary at best.
- 7.11 The ability unilaterally to set price and non-price terms from the start, and other aspects, against this “essential facility” background, confirm the LFCs and related interests as “major suppliers”.
- 7.12 Note that, while the UFB initiative being in the “major supplier” category leads to greater focus under the Reference Paper, the independent regulator obligations apply regardless.

8. Interpretation of the GATS telecommunications obligations

- 8.1 Like many treaty documents, the Reference Paper, although legally binding, states the position briefly. While conclusions can be drawn from the text itself, regard needs to be had to interpretation principles.
- 8.2 International treaties, such as GATS and the related telecommunications agreements are interpreted in accordance with the 1969 Vienna Convention on the Law of Treaties.¹³ The convention is a codification of the customary international law for the interpretation of treaties, anyway.¹⁴ Therefore, the Vienna treaty is a useful summary.
- 8.3 Articles 31 and 32 provide, among other things:

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.....

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

- 8.4 In this opinion we focus on meaning, context, object, purpose, and subsequent practice and agreements. If necessary to advise in more detail, we would consider additional material such as the travaux préparatoires. However, the likely position is apparent from the material we have already seen, and we expect that further review would give greater certainty to our view.

¹³ http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

¹⁴ Page 88 Antony Aust, Handbook of International Law (2005, Cambridge University Press).

9. Context: Appointment of independent regulators and forbearance

- 9.1 Subsequent to the agreement of the Reference Paper, appointment of regulators independent from Ministries and Ministers became widespread. As at 1996, for example, all but 2 of the OECD countries had independent regulators separate from Ministries.¹⁵ There is never total independence (regulators after all are a branch of government, and in New Zealand's case there is a direct role for the Minister). But that does not support the Government, Ministry, Minister and/or CFH being "regulator" in place of an independent regulator.
- 9.2 While in New Zealand the independent regulator remains in existence, a major part of its role (probably the most important part of its role in relation to fixed line services) has been removed for 10 years, and given to Government control and discretion instead. The reality is that there is no independent regulator for LFC services (save for a small role, which is well short of the full role as to price and non-price terms and does not meet GATS requirements).
- 9.3 This cannot be justified by use of words such as "forbearance". There is no allowance made for this in the GATS material, and New Zealand's accession to the GATS obligations. New Zealand must comply immediately: there is no right for governments to allow "forebearance".
- 9.4 In summary, there is no independent regulator for a major part of telecommunications in New Zealand, contrary to the near ubiquitous position in the OECD.

10. APEC

10.1 In 2005, APEC adopted the *APEC Best Practices for Implementing the WTO Telecoms Reference Paper*.

10.2 As has been stated:¹⁶

This APEC Guide was developed to reflect APEC-TEL's strong support for WTO commitments in line with directions that APEC Leaders have given over the past several years

10.3 New Zealand accepted and supported the *APEC Best Practices for Implementing the WTO Telecoms Reference Paper*. It was involved in its preparation.

10.4 However, APEC is a body that does not produce legally binding obligations upon nations. While any breach of the Best Practices document may raise issues other than legal concerns, failure to follow them does not have direct legal consequences.

10.5 The *APEC Best Practices for Implementing the WTO Telecoms Reference Paper*, are, however, legally relevant given they were created by APEC, including with New Zealand's involvement and support. As the Vienna Convention confirms, subsequent conduct is relevant to interpretation of treaty obligations.

¹⁵ OECD, [Telecommunication regulatory institutional structures and responsibilities](#) (2006).

¹⁶ Muhammad Hanafiah I DA Singapore 6-11 April 2009 APEC TEL – WTO Capacity-Building Workshop on Telecom Trade Rules & Regulatory Disciplines (http://aimp.apec.org/Documents/2009/TEL/TEL39-LSG-WKSP1/09_tel39_lsg_wksp1_014.pdf).

- 10.6 In stating 'Best Practice' on the Reference Paper's provision as to an independent regulator, APEC *Best Practices for Implementing the WTO Telecoms Reference Paper* says:

CHAPTER 6 – INDEPENDENT REGULATORS

Independent regulators

The regulatory body is separate from, and not accountable to, any supplier of basic telecommunications services. The decisions of and the procedures used by regulators shall be impartial with respect to all market participants.

6.1 Background

A competitive telecommunications market depends on an independent body capable of establishing and enforcing transparent and impartial regulatory rules and decisions.

6.2 Independence

True regulatory independence has several critical components that work together to enable independent decision-making by the regulatory authority.

- a. The regulator must be functionally and legally separate from all market participants.
- b. The financial interests of the regulatory body (and its employees) should be clearly independent from all market participants.
- c. Legitimacy of a regulatory body is also furthered by having the structure, funding, and human resources adequate to enable it to implement its regulatory mandate.
- d. Policies should be adopted to govern the conduct of employees to ensure independence and impartiality.

6.3 Impartial procedures and decisions

Regulators employ a wide range of regulatory procedures to make many decisions within their mandate. The key principles behind these procedure and decisions are transparency and objectivity; in other words, "hear the other side" and "don't be a judge in your own cause".

Examples of transparent practices include:

- a. publishing all laws, regulations, rules and guidelines relating to telecommunications;
- b. providing interested parties with advanced notice of and an opportunity to comment on rules, policies and decisions proposed by the regulator;
- c. publishing decisions and reasons behind the decisions;

- d. providing an avenue to appeal the regulator's decisions; and
- e. using the regulator's website as a depository of all their decisions and consultations.

Transparency is an important element in the existing WTO reference Paper, which requires transparency in the area of interconnection, licensing, universal service, and allocation and use of scarce resources. In this context, transparency allows market participants to effectively engage in negotiations with incumbents for cost-oriented interconnection.

- 10.7 These requirements are the antithesis of Government/CFH taking unilateral action and removing the Commission's powers. The comprehensive requirements in the *APEC Best Practices for Implementing the WTO Telecoms Reference Paper* are not being applied to LFC services.
- 10.8 The *APEC Best Practices for Implementing the WTO Telecoms Reference Paper*, given APEC and New Zealand involvement and the relevance of subsequent conduct in interpreting GATS, support the conclusion that the current regulatory powers and obligations of the Commission, which fulfil GATS obligations, should not be removed. The outcome otherwise would be that there is no regulator for LFC services beyond the limited and largely unrelated new powers.

11. Interpreting the independent regulator obligation: conclusions

- 11.1 The requirement in the Reference Paper is, at Clause 5:

Independent Regulators

The regulatory body is separate from, and not accountable to, any supplier of basic telecommunications services. The decisions of and the procedures used by regulators shall be impartial with respect to all market participants.

Looking at the words themselves

- 11.2 The obligation is briefly stated. However, there are some initial conclusions from the words themselves:
- (a) The regulatory body's decisions and procedures must be impartial with respect to all market participants.
 - (b) The regulatory body must be separate from any supplier of basic telecommunications services.
 - (c) The regulatory body must not be accountable to any supplier of basic telecommunications services.
 - (d) The obligation applies immediately. There is no allowance for delay or "forebearance". Governments do not have that discretion.

Must there be an independent regulator?

11.3 Although the Reference Paper does not explicitly state that there must be a regulator, this is clearly implicit in the overall packaged structure of the Reference Paper,¹⁷ and follows also from subsequent practice including:

- (a) the OECD widespread acceptance of independent regulators (and beyond the OECD as well); and
- (b) the position set out in the APEC *Best Practices for Implementing the WTO Telecoms Reference Paper*.

11.4 In her paper, *Exploring the Reference paper on Regulatory principles*, Boutheina Guermazi summarises the pivotal role of the independent regulator in the context of the regulatory and competition framework in the Reference Paper:¹⁸

Establishing a regulatory framework for telecommunications sector requires, in addition to setting substantive rules such as those pertaining to interconnection, universal services, licensing etc., the design of the regulatory institutions. A regulatory entity is a crucial factor in the liberalization of telecommunications services. The role of a regulator as a referee in enforcing rules between market players is crucial for a successful competitive market.

.... the establishment of regulatory bodies has become one of the most important developments in telecommunications

There will be no GATS-compliant independent regulator of LFC services

11.5 As noted above, a 10 year ending of the regulatory body's role as to a service means that the Commission is not the "regulatory body" for the purposes of the Reference Paper requirement for that 10 years. Granting of other powers (particularly the power to monitor the deed) does not alter this conclusion as the key powers are removed (namely, the ability to seek inclusion of LFC services as regulated services and then to set price and non-price terms). In effect, there is no independent regulator as to key issues.

11.6 Lack of an independent regulator in this material respect breaches the legal obligations under the Reference Paper. This is a particularly pronounced problem with LFC services as they will become the main access services, replacing the copper access network. This change goes to the heart of fixed line regulation.

Can Government, Ministry, Minister and/or CFH be the independent regulator?

11.7 If it is argued that the Minister, the Ministry and/or CFH constitutes the independent regulator for the purposes of GATS, there would still be a breach as:

- (i) they are not a regulatory body under GATS;

¹⁷ Terms and requirements will be implied if necessary, and this is often necessary given the briefly stated nature of many treaties: see Antony Aust, *Handbook of International Law* (2005, Cambridge University Press).

¹⁸ www.wto.org/english/tratop_E/serv.../guermazi_referencepaper.doc, Pages 12-13.

- (ii) they are not separate from suppliers of basic telecommunications services, namely, the Local Fibre Companies (and Government itself and/or CFH). Government has a substantial role in relation to UFB, as co-owner via CFH, investor via CFH, equal representation on the LFCs' boards along with the investing partner for the 10 years, and its design and selection of the UFB/LFC structures, etc.
- (iii) they are accountable to suppliers of basic telecommunications services (for example they have funding obligations as to the LFCs). An "accountable" party cannot be the independent regulator under Clause 5; and
- (iv) following the words of Clause 5, "The decisions of and the procedures used by [them are not] impartial to all market participants". For example, the `access seekers and other stakeholders have not been consulted on many issues, including the decision to have a 10 year regulatory forbearance. Further, the public sector interests have conflicts of interest (and also perceived conflicts of interest, an important aspect of public sector duties) arising out of their multiple interests in the UFB.

Substance over form

- 11.8 In context (and taking account, for example, of the APEC Best Practice of looking to functional realities) it would not be legally correct to treat the various Government components (LFCs, CFH, MED, Minister and/or Government, etc) as separate for GATS purposes. For example, it would not be correct to say: "CFH (and the LFCs) are separate from Government and therefore there is no independent regulator issue".
- 11.9 To illustrate, the ITU in the passage quoted notes that the Reference Paper was agreed at a time when many governments still owned the incumbent telecommunications operators. Often these would be in wholly owned companies. The correct approach is to conflate the operator into government for these purposes.
- 11.10 The reality is that there are multiple relationships and overlaps. It is necessary to look to substance not form.

Government's Reasons for a regulatory holiday

- 11.11 Government give four main reasons for the regulatory forbearance:
- (a) the contract between CFH and the investing partners acts as "regulation";
 - (b) giving investors certainty;
 - (c) the price of wholesale services over the existing copper network will act as a competitive constraint on the price of UFB fibre services; and
 - (d) new NGN services call for a new not a legacy regulatory model.
- 11.12 Whatever the merits of these views, none overcomes the breach of the GATS requirements. For example, an independent regulator such as the Commission might, in some instances, adopt "regulation" by contract, and that would be compliant with GATS. However, that is not something that a party other than the Commission can do, particularly Government and/or CFH.

11.13 An independent regulator such as the Commission can, and does, consider those four issues when deciding on what course to take.

11.14 In relation to the call for a new not a legacy regulatory model, regulators can and do look at new regulatory models for new circumstances. The EU for example has been able to accommodate its detailed and reasoned September 2010 Recommendation as to regulation of services such as UFB within the existing regulatory framework, which directly applies the WTO/GATS model.

11.15 However, while the regulator can advance new regulatory models for new technologies and markets, within GATS obligations, Government doing so will breach GATS legal obligations.

Ministerial control and power

11.16 Ironically, as part of our regulatory process, it is the Minister that makes the final call on whether to regulate a particular service.¹⁹ So Government has substantial control when and if the regulator recommends regulation of UFB services. But that is quite different from Government simply making a unilateral decision, without going to consultation, to impose a 10 year regulatory holiday. The Minister's role is part of a broader regulatory structure.

11.17 Government also has the ability to issue policy statements to the Commission, as it currently proposes to do. In this way, Government is able to provide non-binding views, which must be considered closely by the regulator.

12. Conclusion

12.1 It is likely that the legislation enabling the 10 year forbearance would breach New Zealand's GATS legal obligations and also contravene, but not legally, the *APEC Best Practices for Implementing the WTO Telecoms Reference Paper*.

¹⁹ It may be that the Minister's role is in breach of the WTO/GATS commitments too, but this is not covered in this opinion.