

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

UNDER the Declaratory Judgments Act 1908 s 3, the
Judicature Amendment Act 1972 s 4(1), and the
High Court Rules Part 30

IN THE MATTER OF an application for a declaratory judgment and/or
judicial review

BETWEEN **CALLPLUS LIMITED**, being a company
whose registered office is at Callplus House, 110
Symonds Street, Auckland

Applicant

AND **THE MINISTER FOR COMMUNICATIONS
AND INFORMATION TECHNOLOGY**

Respondent

STATEMENT OF CLAIM

Dated: 7 November 2013

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STATEMENT OF CLAIM

A. THE PARTIES

1. The applicant (**CallPlus**) is a duly registered company having its registered office at Callplus House, 110 Symonds Street, Auckland. It is a recognised provider of telecommunications services under the Telecommunications Act 2001 (**the 2001 Act**), and as such it are directly affected by any review of or amendments to the 2001 Act.
2. The respondent (**the Minister**) is the Minister responsible for the 2001 Act and exercises statutory powers and duties under that Act. The Minister's powers and duties include the duty under s 157AA of the 2001 Act to conduct a review of the framework for regulating telecommunications services in New Zealand in the manner prescribed in that provision.

B. ULTRA FAST BROADBAND INITIATIVE

3. In or about September 2009 the Government announced an Ultra-Fast Broadband Initiative (**the UFB Initiative**).
4. The UFB Initiative involved:
 - 4.1 a competitive tender programme to develop fibre-to-the-premises broadband networks connecting 75% of New Zealand households, with the support of \$1.35 billion of Crown investment funding (**the new fibre broadband network**);
 - 4.2 the Crown, through Crown Fibre Holdings Limited (**CFH**), and private sector partners selected through a competitive tender process (ultimately, Telecom/Chorus and other Local Fibre Companies (**LFCs**)), together investing in building the new fibre broadband network infrastructure;
 - 4.3 that new fibre broadband network infrastructure operating alongside the existing copper-line telecommunications network in New Zealand (**the existing copper network**), and competing with that existing network;
 - 4.4 such operating of the existing copper network taking place within the framework of the 2001 Act, and with no further change to that

framework in the transitional period being anticipated from 2011 to 2019 (when roll-out of the new fibre broadband network is expected to be completed), including on the basis that, pursuant to that framework, certain price points could be reset by the Commerce Commission for wholesale inputs used to provide copper network access, being the Unbundled Bitstream Access (**UBA**) service and the Unbundled Copper Local Loop (**UCLL**) service.

5. On or about 30 June 2011 the Telecommunications (TSO, Broadband, and Other Matters) Amendment Bill was enacted (**the 2011 Amendment Act**).
6. The 2011 Amendment Act amended the 2001 Act, inter alia, to support the implementation of the UFB Initiative, including by:
 - 6.1 providing for a general review of the 2001 Act, to begin not later than 30 September 2016 and to be completed not later than 31 March 2019, and to account for the telecommunications market structure, technology developments, competitive conditions in the industry, and the impact of investment in the fibre, copper, wireless, and other telecommunications networks, resulting in regulatory/legislative changes appropriate to the industry following the completion of the new broadband fibre network (see s 25 of the 2011 Amendment Act, enacting s157AA); and
 - 6.2 making amendments to enable the structural separation of Telecom and Chorus in the event that Telecom was selected as a private sector partner to invest with the Crown in building the new fibre broadband network infrastructure (see Part 2 of the 2011 Amendment Act); but
 - 6.3 leaving unaffected the Commerce Commission's power to adjust price points for the wholesale inputs used to provide copper network access, notwithstanding any effects any adjustments might have; and
 - 6.4 requiring the Commerce Commission to review the price for the UBA service.

C. TELECOM/CHORUS SUCCEED IN TENDER BID

7. By May 2011 the Crown (through CFH) had selected Telecom/Chorus (on the basis that Chorus would be the contracting party after demerger with Telecom) under the competitive tender programme to build and operate approximately

70% of the new fibre broadband network. LFCs would build the fibre network in certain other areas where Chorus was not contracted to do so.

8. The Telecom/Chorus bid the Crown (through CFH) selected through the tender programme:

8.1 was based on Crown and Telecom/Chorus assessments of commercial and other risks and rewards in investing in construction and operation of the new fibre broadband network;

8.2 took account of the existing regulatory regime set in the 2001 Act (as amended by the 2011 Amendment Act), including that the Commerce Commission had the power to adjust price points for certain wholesale inputs used to provide copper network access, and that the Commission was required to review the price for the UBA service; and

8.3 was negotiated by the Crown (through CFH) and Telecom/Chorus into agreed contractual terms for Chorus, following separation from Telecom, to build and operate approximately 70% of the new fibre broadband network alongside the existing copper network which Chorus is the dominant provider of.

9. Consequent upon the Crown's selection of the Telecom/Chorus tender programme bid:

9.1 Telecom and Chorus were structurally separated into separate entities;

9.2 the Commerce Commission was to review the price of:

(a) the regulated wholesale UBA service; and

(b) the regulated wholesale UCLL service.

D. AN ISSUE OF INTERPRETATION ARISES

10. On or about 3 December 2012 the Commerce Commission issued:

10.1 a final determination under ss 30M and 30R of the 2001 Act resetting the UCLL service price on an Initial Pricing Principle (**IPP**) basis; and

10.2 a draft determination under ss 30M and 30R of the 2001 Act setting out the Commerce Commission's proposals for resetting the UBA service price on an IPP basis (**the UBA draft determination**).

11. The Commerce Commission in the UBA draft determination proposed to reduce the price Chorus can charge for the UBA service from \$21.46 to \$8.93.
12. On or about 8 February 2013 the Minister announced, inter alia, that a wider review of the policy framework for regulating telecommunications services in New Zealand was to begin immediately under s 157AA of the 2001 Act. The Minister's announcement was based, inter alia, on the UBA draft determination issued by the Commerce Commission on 3 December 2012.
13. In or about August 2013 the Minister, further to her 8 February 2013 announcement, released a discussion document titled "*Review of the Telecommunications Act 2001*" (**the discussion document**).
14. The discussion document proposes to use s 157AA of the 2001 Act:
 - 14.1 to conduct a phased review of the regulatory framework currently set in the 2001 Act (and the 2011 Amendment Act);
 - 14.2 in the initial phase of that review, to look at whether the current regulatory framework is fit-for-purpose for transitioning from the existing copper network to the new fibre network; and
 - 14.3 also in the initial phase of that review, possibly to have the government intervene in terms of the 2001 Act:
 - (a) to set prices for the UBA service (option 2) or the UCLL service (option 1 and 3) above the prices currently set by the Commerce Commission for these services; and
 - (b) to make other changes to the existing statutory framework under the Telecommunications Act.
15. Reliance on s 157AA for the purpose of completing a limited review for the purpose of addressing a discrete issue, is unlawful.
16. A declaration is therefore sought that s 157AA of the 2001 Act does not provide a lawful basis upon which to conduct the review that is proposed in the discussion document (outlined in paragraph 14 above).

E. DECLARATION AND RELIEF SOUGHT

17. In summary the applicants seek:
 - 17.1 a declaration in terms of paragraph 16 above;

- 17.2 such further or other relief as the Court considers just; and
- 17.3 the costs of and incidental to this proceeding.

This statement of claim is filed by Michael Brannan Wigley, solicitor for the applicant. The address for service of the applicant is the offices of Wigley & Co, Solicitors, Level 6, 23 Waring Taylor Street, Wellington.

Documents for service on the applicant may be:

- (a) posted to the solicitor at PO Box 10842, The Terrace, Wellington; or
- (b) sent to the solicitor by email at Michael.Wigley@wigleylaw.com (copied to counsel at Karen.Clark@chambers.co.nz and Matthew.Smith@chambers.co.nz).