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TRUSTPOWER'S CROSS SUBMISSION ON FIBRE INPUT METHODOLOGIES – PROCESS PAPER

Introduction

The Commerce Commission (**the Commission**) has begun implementing the new regulatory regime for fibre fixed line access services (**FFLAS**) as per Part 6 of the Telecommunications Act 2001 (**the Act**).

Following the receipt of submissions from interested parties on the Commission's proposed approach to developing the new regime, as set out in its 9 November 2018 *New regulatory framework for fibre* consultation paper (**Consultation paper**), the Commission has now issued a request for cross-submissions.

This cross-submission provides Trustpower's views on the matters raised in other party's submissions that are most relevant to Trustpower's participation in the telecommunications sector.

Trustpower's perspective

Trustpower is a multiproduct retailer that offers a bundle of electricity, gas and telecommunications services to its customers. We currently retail to around 271,000 electricity connections, 93,000 telecommunication customers and 37,000 gas customers. As a market challenger in the telecommunications sector, Trustpower has established a reputation for developing disruptive service propositions and has made a significant contribution to the adoption of fibre services.

We consider it is important that a level playing field is maintained under the new regulatory regime so that genuine, credible market challengers operating sustainable business models can continue to provide benefits to customers by delivering innovative solutions and competitive pricing. A core component of ensuring the success of market challengers is that access to wholesale inputs must be available on terms that enable genuine credible market challengers to compete effectively against larger participants, particularly those who benefit from vertically integrated mobile businesses.

Submissions received on the Consultation paper reinforce our views around the importance of the Commission considering how to maintain a level playing field by ensuring that one form of competition is not favoured over another.

Structure of this submission

Our cross-submission predominantly focuses on the views of other parties that could have implications for maintaining a level playing field and ensuring genuine, credible market challengers can continue to offer benefits to customers under the new regulatory environment for fibre.

Having reviewed the submissions received from other parties, we have also identified a number of broader matters on which we also offer views in this cross-submission.

Our submission is structured as follows:

- Section 1 - Interpretation of the statutory purpose statements
- Section 2 - Getting the balance right between flexibility and prescription
- Section 3 - Ensuring a level playing field is maintained
- Section 4 – Accounting for the impacts of substitutes for fibre
- Section 5 – Calculating the losses associated with UFB1 roll out
- Section 6 – Ensuring appropriate quality standards

Section 1 – Interpretation of the statutory purpose statements

In submissions on the Consultation paper, various parties commented on the interpretation of section 166(2) of the Act and, in particular, how to interpret paragraph (b) which requires the Commission and the Minister to give effect, if relevant, to the promotion of competition in telecommunications markets.

Section 162 applies to the whole of Part 6 (which includes section 166(2)) and requires the promotion of outcomes that are consistent with outcomes produced in workably competitive markets. Section 162 contemplates promoting outcomes that include incentives to innovate and invest and incentives to improve efficiency and deliver a quality that reflects end-user demands. Part 6 provides various tools for achieving these outcomes, in particular price-quality regulation and information disclosure requirements.

It is important to note, for example, that Part 6 does not elevate the promotion of infrastructure-based competition (whether enabled by layer 1 access or through other technologies, such as mobile) as a superior means of achieving these outcomes (incentives to innovate and invest, etc.). In this respect, we differ from what we perceive to be the views of Spark and Vodafone, which seem to suggest that the promotion of infrastructure-based competition, where relevant, should be the key consideration for the Commission and the Minister in applying section 166(2).

The promotion of infrastructure-based competition is not an objective in itself under the Act. What is important in terms of section 162 is the interests of end-users in markets for FFLAS. While we recognise that infrastructure-based competition can benefit end-users in certain circumstances, the Commission's focus should be on the FFLAS retail market as a whole and that market includes services-based competitors acquiring layer 2 access from Chorus and LFCs, within the framework of Part 6, as well as infrastructure-based competitors.

Section 2: Getting the balance right between flexibility and certainty

The challenges around striking the right balance between enabling flexibility and providing certainty within the new arrangements are captured in a number of submissions, and are often closely intertwined with the broader question of whether the Commission needs to proactively support unbundling of fibre within the design of the fibre input methodologies (**IMs**).

We consider that the level of prescription that should be adopted in establishing the new regulatory arrangements is an important design consideration. Our views around the adoption of principles vs. prescriptive arrangements within the new regime are outlined in section 2.1.

We also touch on the important matters of both regulatory certainty and regulatory burden that were raised in submission, in sections 2.2 and 2.3, respectively.

2.1 Prescription vs principles

The adoption of prescriptive vs principles based IMs is captured by a number of submitters.

Chorus notes that prescription carries risks:

“Fibre services are expected to evolve over time in accordance with market development and consumer demands. So, setting network quality requirements which are rendered inappropriate by subsequent market development are harmful as they constrain all services.”¹

The Local Fibre Companies (**LFC's**) outline similar views around the need for flexible principle based IMs.

Spark outlines that a mix of both prescriptive and principles based IMs will likely be required. They note that: *“high level of prescription will ideally be provided where the regulated suppliers’ interests could harm competition.”²* Trustpower agrees that a combination of approaches will be required.

Vodafone’s submission outlines that more complex and prescriptive cost allocation rules will be required for fibre networks than has been the case for electricity networks under Part 4 previously:

“... the prices and quality set by the fibre providers will have a significant bearing on dynamic efficiency for the sector. The light-touch guidance used by the Commission for regulations set under Part 4 are not appropriate.”³

“How costs are allocated within the Part 6 regime will have a huge bearing on the success of both existing and potential competition... Frontier’s report shows that cost allocation for fibre services will be far more complex and risky than for Part 4. As a consequence the cost allocation rules need to be far more sophisticated, and in some cases will require detailed prescription within the input methodologies.”⁴

Similarly, Spark note that:

“Chorus has likely strong incentives to allocate those common costs in ways that reduce or foreclose potential competition when setting prices. Therefore, the cost allocation IM should seek to provide clear guidance about how all allocations should be done and similarly prescriptive pricing principles methodology prepared.”⁵

We agree that ensuring costs are appropriately allocated will be an important consideration under the new fibre arrangements. The guidance provided by Vodafone’s advisor, Frontier Economics, around when more prescriptive rules for cost allocation should be developed is a useful contribution.

More broadly, Vodafone suggests that a light handed regulatory approach will not be appropriate. Vocus shares a similar view and supports a prescriptive approach to drafting the IMs being adopted:

¹ Chorus submission on new regulatory framework for fibre, page 48

² Spark submission on new regulatory framework for fibre, page 9

³ Vodafone submission on new regulatory framework for fibre, page 4

⁴ Vodafone submission on new regulatory framework for fibre, page 19

⁵ Spark submission on new regulatory framework for fibre, page 11

“...having highly prescriptive Input Methodologies which minimise discretion or room for judgement will be particularly important for any rules or methodologies relating to supplier (Chorus) requirements to present a price-quality path proposal (if supplier proposals are adopted as part of the new regulatory regime).”⁶

Vocus suggests that:

“...a bright line test or principle for determining the extent to which the Input Methodologies should be prescriptive (or, colloquially, “crank the handle”) or flexible, is to consider which elements of price-quality control will require change and the exercise of judgement at each regulatory reset, and which will not. Any element of the price-quality control that can be operated on a “set and forget” basis should be incorporated into the Input Methodologies.”⁷

There may be some merit in the suggestion of developing a framework/test/principle for determining the level of prescription around a matter being considered in an IM – particularly where prescription would encourage vibrant competition at the retail level (predominantly for the quality elements) or relates to a matter that should be enduring for the entire life of the IM such as cost allocation. We however consider it is important that the Commission is provided with an overarching discretion so that it can ensure that the outcomes from the new regime promote the purpose statements.

We do not, however, agree that a higher level of prescription within the IMs for fibre will be required across the board. This is because:

- maintaining flexibility within the new regulatory framework will be important so that adjustments for changes in the competitive environment due to the impacts of substitutes can easily be made. This point is well captured in Chorus’s submission; and
- adopting more prescriptive requirements should be at the discretion of the Commission, as outlined above.

2.2 Regulatory certainty

Chorus makes a series of recommended changes to the Commission’s proposed process in order to provide initial certainty around those matters that are key to its investors, including the initial Regulated Asset Base (**RAB**), cost of capital, process for setting opex and capex and determination of the new information disclosure (**ID**) regime.

Chorus notes:

“Significant ongoing regulatory uncertainty remains until the Commission sets the initial RAB and cost of capital and determines the revenue cap. This period of uncertainty has been lengthened by the extension to the implementation date from 1 January 2020 to 1 January 2022.”⁸

In contrast 2degrees notes that:

“... it must be recognised that regulatory certainty is important for access seekers and end-users, and not just for access providers... The establishment of the IMs will help improve regulatory certainty as will any subsequent statutory reviews and Merit Appeal decisions.... Regulatory certainty is not something which can, or should, be automatically created on the Implementation Date...”⁹

Trustpower is an investor in long-lived electricity generation assets and understands the importance of regulatory certainty. As a result, while we agree with 2degrees that regulatory certainty will be established over time, we are generally sympathetic to Chorus’s request for a revised process for developing the IMs.

⁶ Vodafone submission on new regulatory framework for fibre, page 12

⁷ Vocus submission on new regulatory framework for fibre, paragraph 15

⁸ Chorus submission on new regulatory framework for fibre, page 5

⁹ 2degrees submission on new regulatory framework for fibre, page 10

We support the Commission in considering whether there is scope within their compacted process to facilitate Chorus's request (even if just partially), particularly for the development of the new ID regime. While complete certainty for Chorus will not be possible until the end of the development of the new fibre regime, there may be elements of the arrangements where they could gain an improved understanding of how it might impact on them earlier, noting these still could be subject to change at a later stage.

2.3 Regulatory burden

The LFC's raise a number of concerns around potential regulatory burden under the new fibre regime:

*"While it is assumed that the regulatory burden on LFCs will be limited to Information Disclosure (ID), and therefore be less intrusive than that imposed on Chorus (which is assumed to also be subject to price quality (PQ) regulation), the compliance costs facing the small LFCs under the Commission's proposed three year Input Methodology (IM) and ID consultation processes are immense."*¹⁰

*"A set of simplified IMs applying only to ID regulation would ensure a proportionate regulatory framework for LFCs, both in development and implementation."*¹¹

We agree with the views of LFCs that the burden of regulation should be proportionate to the expected benefit and potential harm to end-users. We assume that this fundamental principle was accounted for by Parliament when deciding that the price-quality regulation is not required for the LFCs at this time.

The arrangements do, however, include a threat of future regulation for the LFCs. For this threat to be effective, we consider that the Commission will need to be in a position to act quickly to implement price-quality regulation for the LFC's, if required in the future. To enable this:

- sufficient information on the RAB for an LFC, along with clarity around matters such as cost allocation that are specific to the LFC's will be required. We understand the new arrangements seek to achieve this through:
 - establishing a price-quality regime that will apply to any fibre service provider specified in the relevant Regulations, thereby enabling the price-quality regime to be quickly applied to the LFC's in the future; and
 - the relevant IM for the "valuation of assets, including depreciation, and the treatment of revaluations" applying also to the LFC's for the purposes of establishing a RAB for monitoring their financial performance under the ID regime. We presume this same RAB would also apply for price-quality regulation purposes in the future, if required; and
- an effective ID arrangement will need to be established and apply from the Implementation Date so as to enable close monitoring of the performance of LFCs.

We encourage the Commission to consider whether other matters relating to the application of price-quality regulation to the LFC's may also need to be clarified within the initial IM's to ensure the Commission is able to intervene in a timely manner if it is required in future.

Section 3: Maintaining a level playing field

In our view maintaining a level playing field will potentially be challenging for the Commission in designing the new regime, particularly as unbundled fibre services are made available.

We note that a core requirement of the new fibre regulatory regime is that the regulatory settings promote outcomes that are consistent with those that would be achieved in a workably competitive market (section 162). This is complemented (and future proofed) by the requirements on the Commission

¹⁰ Enable Fibre Broadband, Ultrafast Fibre, and Northpower Fibre combined submission on new regulatory framework for fibre, page 7

¹¹ Enable Fibre Broadband, Ultrafast Fibre, and Northpower Fibre combined submission on new regulatory framework for fibre, page 3

to give effect to the promotion of competition in telecommunications markets more generally, including mobile and fixed wireless (section 166(2)(b)). We consider that maintaining a level playing field is an essential element of being able to deliver on these two purpose statements.

The following subsections outline our views on:

- the importance of maintaining a level playing field (section 3.1); and
- the requests made by some RSPs for greater pricing certainty around layer 1 services (section 3.2).

3.1 *The importance of maintaining a level playing field*

Chorus's submission touches on the importance of encouraging workable competition in the fibre market, noting that:

- a structurally separated fibre-to-the-home model was intentionally adopted in New Zealand in order to promote competition, a decision that is in line with global trends; and
- in designing the new fibre regulatory arrangements, the Commission needs to be careful to not un-do the benefits of the chosen model for deploying fibre, in favour of growth of vertically integrated operators:

Chorus states:

"When making decisions on how to apply the Part 6 purpose statement we encourage the Commission to consider the rationale of the UFB model, which is to promote competition in retail markets, and avoid any actions that could reduce competition among Retail Service Providers (RSPs)"¹².

"We encourage the Commission to consider that the primary reason for Chorus' existence as a structurally separated, wholesale only service provider is to encourage workable competition in retail markets for fixed-line broadband services. Accordingly, the Commission should not take any decisions that would prioritise competition in other markets over that objective, e.g. decisions that would reduce the ability of consumers to easily switch RSPs or disadvantage RSPs who do not own mobile networks"¹³

We agree with Chorus that it will be important for the Commission to consider the broader competitive implications of the new fibre regulatory regime.

The UFB has been a key Government policy initiative over the last ten years and its ongoing significance is recognised throughout the Act. It has enabled smaller RSPs to compete effectively with scale providers, with all players having similar underlying wholesale costs for key inputs. UFB has provided a level playing field, with each RSP operating off the same platform. Equality between RSPs has been at the heart of UFB.

In the coming years, we will see the introduction of layer 1 access (unbundled fibre service), which will change the competitive landscape.

In making its decisions under Part 6, including in relation to the new unbundled fibre service, the Commission should ensure that a level playing field is preserved between RSPs by ensuring that one form of competition is not favoured over another. With the Commission's focus in Part 6 being on end-users of FFLAS services, the interests of end-users will best be promoted through the preservation of this level playing field.

3.2 *Requests for greater pricing certainty around unbundled services*

A number of submissions seek to use the development of the fibre IMs as an opportunity to gain greater certainty around the potential price of layer 1 services from Chorus and the LFCs.

¹² Chorus submission on new regulatory framework for fibre, page 2

¹³ Chorus submission on new regulatory framework for fibre, page 7

Vodafone suggest that unbundling is critical to meeting the objectives of the section 162 purpose and suggest that the Commission “*must do all in its power to make unbundling a commercial reality*”¹⁴ and “*has a duty to do all in its power to facilitate it emerging on fair terms*”¹⁵.

Vodafone specifically notes that:

*“The Commission must also encourage the emergence of new competitive markets where it is in the long term interest of end-users. For example, fibre unbundling has the potential to deliver fantastic innovation and efficiency outcomes for end-users. But for this to become a commercial reality, it will need active guidance from the Commission to help fibre providers navigate through their various obligations. This guidance is best codified as a distinct unbundling input methodology to provide sufficient clarity and predictability.”*¹⁶

“While the Act does not allow the Commission to propose a price for the unbundled service until the end of the first regulatory period, and unbundling input methodology would still play a vital role in the regime. It would provide certainty around key interpretation for information disclosure, and future review of the unbundling price...”

*The input methodology should cover three topics: how equivalence of inputs obligations apply to price; how non-discrimination and equivalence obligations apply to non-price terms; and how a review of the unbundling product is triggered after the first regulatory period.”*¹⁷

Spark notes that:

*“Given the importance of pricing efficiency, the Commission should avail itself of its broad power to determine IMs to prepare a methodology articulating some key pricing principles; namely: how the maximum “cost-based” prices for particular services will be defined and expanding upon the principles set out in the fibre deeds (eg non-discrimination obligations).”*¹⁸

Axiom Economics (on behalf of Spark) notes:

*“... there are no controls over what Chorus can charge for layer 1 services in the initial regulatory period. In my opinion, that is curious, considering the incentives that Chorus is likely to have to discourage uptake of the service. Indeed, it seems curious to compel Chorus to provide the service – presumably in recognition of the fact that it might otherwise refuse to do so – but to then place no clear restriction on what it can charge for it.”*¹⁹

Axiom recommends that the Commission avails itself of its broad power to determine IMs to prepare a methodology articulating some key pricing principles. Specifically that it should outline how the maximum “cost-based” prices for services like the unbundled fibre service will be defined, in expectation of having to undertake those tasks at some future point.

Vodafone similarly supports pricing principles being established that would prescribe a requirement for prices of services to be set relative to each other, along with a process that would be followed for price changes.

The submissions by Spark, Vodafone and Vocus imply that it is a simple matter of providing greater guidance around how price and non-price terms for layer 1 services should be determined (to accord with the existing obligations of equivalence and non-discrimination) in order to support investment decisions in layer 2 services.

In reality the Commission will need to carefully consider the competitive implications of unbundling, particularly with respect to maintaining a level playing field for all participants, prior to making any

¹⁴ Vodafone submission on new regulatory framework for fibre, page 11

¹⁵ Vodafone submission on new regulatory framework for fibre, page 14

¹⁶ Vodafone submission on new regulatory framework for fibre, page 3

¹⁷ Vodafone submission on new regulatory framework for fibre, page 14 -15

¹⁸ Spark submission on new regulatory framework for fibre, page 10

¹⁹ Axiom Economics – report for Spark on new regulatory framework for fibre, page 28-29

decisions around greater regulatory intervention within this aspect of the new fibre regime. The Commission will also need to consider the operational complexity that could be introduced, costs that could arise (including from duplicated assets), and the potential end-user experience in an unbundled fibre world. We see this as being a significant exercise for the Commission and one that should not be rushed, particularly when the Commission has a large book of work implementing the regime for the first regulatory period.

Section 4: Accounting for the impacts of substitutes for fibre

How the impact of substitutes to fibre (i.e. fixed wireless and mobile services) should be taken into account will be a challenging element for the Commission in designing the new regulatory regime.

Pat Duignan's submission captures some of the medium term challenges around the potential impacts of fixed wireless on demand for fibre services:

*"The way competition between 5G FWAS and FFLAS plays out will be significantly influenced by the form and results of the Government's tendering of spectrum. The tendering process will affect the potential for and intensity of competition between competing FWAS providers which in turn will condition their competition with FFLAS."*²⁰

We agree with Mr Duignan's assessment that spectrum allocation arrangements will be of significance in deciding how competition plays out in both the mobile and fixed line markets. We have drawn similar links in our submission on the mobile markets study – where we suggested that the Commission should be responsible for the allocation of spectrum given the potential competitive impacts of spectrum auction outcomes for 5G.

Mr Duignan's submission also captures the longer term challenges associated with increasing ability for substitution, particularly with respect to the treatment of stranded assets within the regulatory regime:

"Under a BBM regulatory approach an increase in the probability of economic stranding of some of the assets of a regulated supplier requires the Commission to consider allowing that supplier to accelerate the depreciation of their assets. The Commission has agreed to do exactly this in the case of electricity distribution businesses. The input methodologies for EDBs have been amended to allow the Commission on application to agree to shorten the remaining lives of EDB assets by up to 15%, with a consequent increase in the depreciation charge for such assets of 17.7%.

*Since significant parts of the fibre network over which the FFLAS is provided are carried on poles shared with EDBs, the issue of economic stranding of EDB assets would seem to have a bearing on the appropriate depreciation rates allowed for FFLAS providers in respect of such assets that they own. Where FFLAS providers utilise assets owned by EDBs economic stranding of such assets in regard to electricity distribution could result in FFLAS providers needing to bear additional costs."*²¹

We are uncertain that a similar treatment of stranded assets to that recently adopted for electricity is appropriate for fibre networks. Both Chorus and the LFCs would have been aware of the threat of substitutes to their network at the time of entering into contracts with Crown Fibre Holdings for the roll out of UFB1 and UFB2. The threat of economic stranding for some of the assets may have already been accounted for in the original business cases for the investments that have been made. To the extent that Chorus and the LFC's may not have appropriately estimated the threat of substitutes then it is Trustpower's view that this is not a matter that end-users should be required to compensate them for within the new regulatory arrangements.

²⁰ Pat Duignan submission on new regulatory framework for fibre, page 1

²¹ Pat Duignan submission on new regulatory framework for fibre, page 2

Section 5: Calculating the losses associated with UFB1 roll out

In its submission, Chorus makes the point in a number of places that it built the FTTP network ahead of demand. This was clearly a business decision. Telecom, as it then was, decided to participate in the UFB project²². It did not have to and indeed it detailed the pros and cons of participating in the UFB project in its communications with its shareholders at the time.

There was no certainty of return, when it decided to participate in the UFB project, that Chorus would recover any losses it incurred, beyond the pricing for the services that applied up to 2020. Chorus investors, therefore, assumed the risk that they would not recover any losses that remained after that date. No assurances were given, as far as we are aware, and Chorus investors could have no expectation of what the regulatory environment would look like after 2020.

As Telecom noted in 2011²³:

“There is no certainty regarding the pricing framework that will apply to fibre-based products and services after 31 December 2019, when the contractual pricing expires. Prices may be regulated, and the regulated prices may be lower than the contractually agreed prices that previously applied, and there is a risk that the prices will be set at levels that do not provide Chorus with an adequate return on its investment.”

*The Telecommunications Amendment Act provides for a review of the telecommunications regulatory framework commencing before 30 September 2016, with best endeavours to complete the review by no later than 31 March 2019. The review must take into account the market structure, technology developments and competitive conditions in the industry at the time of the review, including the impact of fibre, copper, wireless and other telecommunications network investment. The review must consider whether the existing regulatory framework is most effective to promote competition, promote the legitimate commercial interests of access providers and seekers, support innovation, and encourage efficient investment. **There can be no assurance that this review will not result in regulation that reduces the prices that New Chorus can charge or impose other requirements that reduce New Chorus’ profitability.”** (emphasis added)*

Chorus now claim that the risks that it took in participating in UFB should be recognised in the revenue and pricing that it can recover under the price-quality regulation. We don’t believe it is as simple as that.

The fact that Chorus decided, in its own commercial interests, to participate in the UFB project and incurring losses that it may never recover needs to be taken into account. The benefit that Chorus received from participating in the UFB project (including subsidised financing and avoiding the prospect of competitive overbuild in the UFB areas)²⁴ should also be taken into account.

Finally, in relation to crown financing costs, we don’t accept Chorus’ argument that the Crown financing was not costless due to step in rights, restrictions on Chorus’ decisions to invest and compete with copper, ex-ante risk of penalties, etc. Section 170(2) requires the Commission to reflect “the actual financing costs” incurred by the provider. We do not consider that contractual rights of the Crown and restrictions on Chorus are in the nature of actual financing costs, such as interest or dividends.

²² At least UFB 1

²³ Telecom 2011 Scheme Booklet for shareholders, page 204

²⁴ See Telecom’s 2011 Scheme Booklet for shareholders, which noted benefits including “*facilitates New Chorus taking a leading role in the Government led fibre initiative; aligns the interests of New Chorus with the Government’s UFB objectives; avoids Telecom competing with Government backed fibre competition if it is not a partner in the UFB Initiative; and leads to the introduction of a simplified regulatory regime with greater certainty and reduced regulatory burden and associated cost*”

Section 6: Ensuring appropriate quality standards

In their submission, Chorus suggests that the Commission just use reporting requirements in the first regulatory period rather than strict quality compliance thresholds.

“Using reporting requirements in the first regulatory period (RP1) rather than strict quality compliance thresholds would also support a pragmatic and appropriate approach to implementation. In the meantime there are a number of regulatory mechanisms to ensure that consumer quality isn’t adversely impacted.”²⁵

Trustpower disagrees with Chorus’s proposal, as we believe there will be significant benefits from having an effective quality regime established from the start of the first regulatory period. An effective quality regime will:

- incentivise Chorus and the LFC’s to continue to invest in improving their network and service offerings beyond those requirements in both the Act and existing contracts with Crown Fibre Holdings;
- ensure services are provided that meet consumers quality expectations; and
- work to mitigate the risk of perverse outcomes by helping avoid over-investment where it is not cost effective.

Contact information

If you have any questions regarding the matters raised in this submission, please do not hesitate to contact me at this email address: paul.bacon@trustpower.co.nz

Regards,

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HEAD OF MARKETS

²⁵ Chorus submission on new regulatory framework for fibre, page 6