

The logo features a decorative dashed line in the top left corner that curves upwards and then downwards, resembling a stylized wave or a series of connected dots. The text "Wigley & Company" is positioned to the right of this graphic.

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BARRISTERS *and* SOLICITORS

**BROADBAND REGULATION – WHAT’S THE  
REALITY?**

**May 2006**

After the euphoria of the broadband announcements earlier this month, what's the reality? It's hard to imagine a much better outcome, from a pragmatic perspective, for ISPs, and internet stakeholders. The Government decisions and Commission moves cover much more than broadband and there's a lot in the detail, but here I'll focus on broadband and where this is heading; outcome and timing-wise. This article was first published in the May Telecommunications Review (for more details about the Review, see [www.ttr.co.nz](http://www.ttr.co.nz) ).

For an IT/Telco lawyer, early this month was a wild ride. Smack in the middle of helping CallPlus and ihug draft submissions for the Commerce Commission, the Minister dynamited the telco regulatory space.

It's hard to imagine a much better outcome, from a pragmatic perspective, for ISPs and internet stakeholders. Underpinning the decisions is an excellent Cabinet Paper from MED. Whether you agree or disagree with it, the paper advances the level of debate on telco regulation to a level of sophistication in ways that's happening off-shore.

It's courageous and impressive stuff.

The Government decisions and Commission moves cover much more than broadband and there's a lot in the detail. For example, when, at any other time, would a major launch of a Commerce Commission review into the cellular duopoly come across as a side issue? Yet that alone is huge.

Here I'll focus on broadband and where this is heading, outcome and timing-wise.

Let's get clear what we're talking about in this complex area. Of the wide array of solutions in the cabinet paper, we're dealing with the local loop broadband initiatives: LLU and upsized UBS.

In practical terms the distinction between UBS and LLU is:

- UBS: Telecom's competitors supply broadband over Telecom's kit (DSLAMs at exchanges or cabinets).
- LLU: Instead they provide it over their own DSLAMs:

We already have a regulatory UBS, but it's slow speed, particularly on the uplink. The new upsized UBS will be a lot faster. Both LLU and upsized UBS should, but will not necessarily, allow that nirvana of triple play -providers via UBS or LLU should be able to provide telephony, video and data.

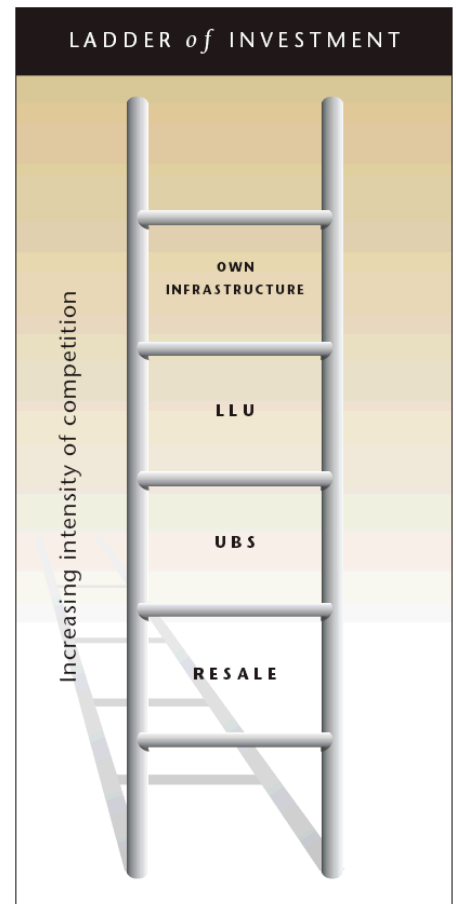
Within upsized UBS there's a sub-set called Naked DSL. Here, the customer doesn't have to take a normal Telecom PSTN telephone service: typically, the new entrant telco/ISP will provide the service over VoIP.

### The ladder of investment

Underlying Government's model is the "ladder of investment" concept in the diagram. As the cabinet paper says, the idea of the ladder is to drive "...wholesale competitors toward investment in their own infrastructure. Commencing at lower rungs of the ladder with basic resale and intermediate wholesale of services while building a customer base, this concept envisages movement via LLU to eventual investment in alternative network infrastructure. The long-run aim of such policies is competition on level terms among operators, and it is important to price wholesale access products appropriately so as to maintain incentives for progressive alternative infrastructure investment."

This tells us a lot about where things are heading. Government is adding rungs to the ladder: upsized UBS (including Naked DSL) and LLU. Pricing and other service terms need to be set and coordinated to incentivise all stakeholders, Telecom included - for its legitimate needs must be met too.

For example, a budding ISP starts reselling Telecom ISP services. Then it gets some infrastructure and moves to UBS, possibly in particular regions (that, by the way, makes it easier for ISPs to meet rural needs). Then when the ISP builds up critical mass in particular areas, it can install its own DSLAMs and use LLU. And so on it goes. Each time, Telecom supplies less and the ISP supplies more.



Introduction of upsized UBS and LLU can't happen overnight - it's just too complicated. There is no choice but for the complexities around issues, such as price and the technical specs of the new services, to be sorted out by the Commerce Commission. Inevitably an economist's and techie's field day (Oh, OK, lawyers too).

The Minister has done as much as he can to speed up the process, by legislating upsized UBS and LLU rather than asking the Commission to deal with it. So that's the first step: upsized UBS and LLU will be added to the list of services included in the Telecommunications Act. This requires legislation and that takes time -bills, select committee hearings, parliamentary time etc. Government is aiming for the amended Act to be in force in December. That's quick and tight timing.

### Entry Ticket

When the Act has been amended, that's the entry ticket only. Telecom is a long way off having to provide LLU and upsized UBS at that point unless it provides it voluntarily.

The providers that want it must apply to the Commission for a determination requiring the service is to be provided, just as has happened over the last few years on various services. The Commission will sort out the terms of upsized UBS and LLU provision, such as price, speeds, technical specs for the service, and so on. That's a heavy process of submission, cross-submission, conference, draft then final determination, and so on.

Telecom and access seekers are required to try and commercially agree matters before applying to the Commission. If history repeats itself, UBS and LLU will head to the Commission and take time to sort (upsized UBS might be resolved quicker than the more complex LLU solution).

Maybe litigation follows too, as happened with the TelstraClear UBS application last year. That application took around a year, not including the preceding commercial negotiations.

After the determination is finally made, there will be an implementation period, measured in the "several months" league.

So, from looking at the cabinet paper, upsized UBS is not looking like going live until late 2007. LLU is assessed as stepping up to the mark in 2008. Maybe that's optimistic. There are a lot of steps and moving parts which can cause slippage. One of the challenges will be for Government and the Commission to keep the foot on the pedal.

Why would it take so long to sort this out before the Commission?

Well, price for a start is a complex issue, just as it has been so far in various Commission determinations. Here, the Commission will also need to make sure there is optimal relativity between the pricing of UBS and LLU, in part to encourage providers to climb the ladder.

Then there will be issues around how providers' competing interests will be managed. For example, what spectrum management method is used to get the optimal balance between factors such as (a) speed of the service and (b) how far away from an exchange or cabinet it will be available?

This may involve trade-offs. Telecom continues to push for maximum speeds at 3.5Mbit/s, which is around half the highest available speeds over DSL, because, they say, that is what best balances conflicting needs. They are doing this when they are around the corner from introducing ADSL2+ with its capability to deliver speeds up to 24Mbit/s.

In taking this approach, they are swimming strongly against the international tide, which has spectrum management models that support much faster speeds.

To go against the strong international trend (that can hardly be described as a trend as it's been well established for years) calls for Telecom to present a compelling case that New Zealand is different. They'd look at going beyond 3.5 Mbit/s, but seemingly only on a lot more conservative spectrum management regime than has been adopted internationally, such as in Australia.

I said above that, in theory, upsized UBS and LLU should deliver triple play including video. But if Telecom continues its current line, it may oppose services that permit full triple play and chances are the amended Act will allow it to argue this.

For LLU, third party providers will of course install DSLAMs in Telecom exchanges and roadside cabinets. So there will be a further regulated service (as well as backhaul services). Telecom will be required to allow providers to install their kit. But what happens if Telecom, leading up to 2008, has already installed new cabinets, as part of its fibre roll-out, that don't have room for extra DSLAMs? That's an example of the sort of issue that can crop up in these situations.

The wild ride for the industry and its customers is set to continue.

Wigley & Company is a specialist law firm founded 14 years ago. Our focus includes IT, telecommunications, regulatory and competition law, procurement, and media/marketing.

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While the firm acts extensively in the commercial sector, it also has a large public sector agency client base, and understands the unique needs of the public sector. While mostly we work for large organisations, we also act for SMEs.

With a strong combination of commercial, legal, technical and strategic smarts, Wigley & Company provides genuinely innovative and pragmatic solutions.

The firm is actively involved in professional organisations (for example, Michael is President of the Technology Law Society).

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