

# Technology

## Crown Fibre could face wrath of jilted bidders

**Michael Wigley**

A \$A10 million claim against the Australian government by jilted broadband network bidder Acacia highlights the challenges faced in New Zealand by government and the company it owns, Crown Fibre Holdings.

Ironically, given the events of the past few days, which seem to have heightened the odds of Telecom's non-compliant bid succeeding, the Acacia consortium included Telecom's fully-owned Australian subsidiary, AAPT.

This week, Telecom said it was considering structural separation – most likely to involve the spin-off of its Chorus networking division – in order to fully participate in the government's \$1.5 billion ultrafast broadband (UFB) project.

And Chorus' boss Mark Ratcliffe has already admitted that Telecom's noncompliant Crown fibre bid involves a pitch for a nationwide contract.

Given the complexity of the UFB structure, Crown Fibre and the government face a wide array of risks, including legal and financial (such as by court proceedings) and review by agencies such as the auditor-general. Unsuccessful bidders in public sector procurement rarely claim against government. However, for ultra fast broadband, considerable sums are at stake. Unsuccessfully bidders may look to their rights.

### Risk ahead

The \$A43 billion National Broadband Network project in Australia was preceded by a more modest broadband network RFP. That first initiative was aborted. The relevant government department has come in for some criticism by the Australian government auditor for the way the RFP was handled.

Acacia alleges the government misled it in an unconscionable and unfair way at key points; it held back information; it formed fixed views against the viability of the tender; and that it milked Acacia's expertise.

Just as in Australia, there is a range of steps that the courts and other agencies might take, depending on what happens.

Public sector entities work hard in tender documents to minimise the risk of such claims. But there are many complexities – some general and some specific to each case – which might lead to exposure.

Acacia, for example, may be trying to get around the tender documentation, and some public law principles, in the way that it frames its claim.

Often, potential court action as to procurement is limited. That may not be so however, particularly in this multi-faceted UFB scenario (which includes MED's involvement too). Unlike most public procurement scenarios (the Auckland Lab Tests saga is an example), UFB has substantial policy and public-facing aspects. For example, in the heavily regulated telecommunications market, setting the wholesale access price for the network, and open access, is quasi-regulation by contract. This type of factor makes it more likely the courts will get involved.

The position isn't fully known, as the tenders and discussions are confidential. Crown Fibre and government could well be doing the right thing.

Also, the legal position is complex, and sometimes controversial.

So, Crown Fibre and government may choose to err on the side of more fulsome consultation, re-formulation of the request for proposals (given reports that non-compliant bids are being considered), and use of principles of interactive engagement with bidders.

### Principles of engagement

Crown Fibre's interactive dialogue with vendors is an excellent initiative. However, the state-owned company may not be doing all that is required to ensure appropriate principled engagement with the bidders. Requirements include:

- fair and equal treatment of bidders;
- provision of the same information and opportunity subject to confidentiality constraints;
- recording of details of communica-

tions with bidders as well as the principles of engagement with bidders (this is also an obligation on Crown Fibre under the Public Records Act); and

- formal rather than informal meetings/workshops.

This is difficult to manage given the complex array of bidders and solutions. But the benefits of getting this right can be the difference between success and failure. Offshore experience shows interactive discussions during tenders can be managed well, giving confidence and benefits to the public sector and business. There are, for example, the EU Competitive Dialogue and Infrastructure Australia's guidelines.

If Crown Fibre does not have or is not applying appropriate principles of interactive engagement with bidders, there may well be problems.

### Give Crown Fibre some space

I've been involved on the inside of complex public sector projects where there is time pressure. I'm guessing Crown Fibre is under a lot of pressure to deliver within a time frame that is too small.

This is not an easy place for Crown Fibre and its directors, particularly as the stakes are high. That's even more reason for us to understand the need to take time and get it right.

Yes, this will leave longer marketplace uncertainty but we are talking about only months for a network that Telecommunications Commissioner Ross Patterson expects to stand for 50 years.

There has been adverse comment about how long this is taking for both government and Crown Fibre. I don't agree. Give them space.

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### Orcon, CallPlus alliance 'just the start'

The country's fourth and fifth largest internet service providers, Orcon and CallPlus (with around 150,000 customers each) have signed an alliance to share broadband infrastructure. The pair have been joined by the much smaller Compass Communications. Local loop unbundling legislation allowed rival phone companies and ISPs, led by Vodafone and Orcon, to move their own DSL hardware into Telecom exchanges, cutting Telecom Wholesale (at least partially) out of the picture. Under their new agreement, Orcon, CallPlus (which includes the Slingshot retail sub-brand) and Compass will share each other's DSL kit inside any unbundled exchange. Orcon chief executive Scott Bartlett told Printout the exchange alliance was just the beginning of what he hoped would be a much wider infrastructure-sharing partnership. Most tantalisingly, Mr Bartlett said it was possible the trio could pool its resources and buying power to gain direct access roadside fibre cabinets – especially if it could muscle their way to a backhaul agreement; ideally one that saw it partner with Vector or a similar alternative to Telecom.

### Others welcome to join. Kinda

The Orcon boss said the alliance would welcome new members but only if they brought some new assets. A spokesman for Vodafone told *Printout* the telco was interested in the proposition. But for the moment, Mr Bartlett said no dice. Both Vodafone and Orcon have unbundled Telecom exchanges in the same city – Auckland. If Vodafone unbundles exchanges elsewhere, then it could join the club. TelstraClear, which has unbundled around 70 Telecom exchanges dotted around the country, is the logical candidate to join the Orcon/CallPlus/Compass alliance. However, Mr Bartlett is temporarily shy on this option, saying complicated backend systems for the existing trio will have to be bedded down before they talk to any outsiders.

### More fierce competition

Does the new alliance herald closer ties between Orcon, CallPlus and Compass? Some kind of merger, maybe? Quite the reverse, Mr Bartlett claims. Sharing phone exchange infrastructure will mean the trio competes "more fiercely" at the retail. For example, Orcon will now be able to offer cheaper, unbundled voice and data plans in Hamilton (where CallPlus has moved into Telecom exchanges) and Christchurch (where Compass has unbundled).

### Joyce: Won't buy Chorus but ...

Early this week, Communications Minister Steven Joyce moved to scotch persistent rumours that the government would buy Telecom's Chorus division. His statement came on the back of Telecom's admission that it is considering the structural separation of its retail and wholesale operations as the price of admission to the government's \$1.5 billion Crown fibre initiative. Printout asked the minister's office to clarify his comment, which is where things got more tangled. "It is the government's intention to invest in the provision of fibre in the ground that would not have otherwise be there without the government's investment," a spokesman said. "The government wouldn't be interested in buying existing assets from other shareholders." So the government couldn't buy Telecom from Chorus? Or take a stake. Well, actually, there is a possible scenario. "The government could theoretically look at putting new money into an existing entity provided it was ring-fenced to the fibre to the home initiative," said the spokesman. Bottom line: almost everything's still on the table.

### The most likely Chorus outcome

Of the myriad possible futures being prophesied for Telecom's networking division, Printout most likes that outlined by Forsyth Barr's Guy Hallwright. The analyst reckons structural separation "will involve Chorus being progressively sold into the UFB project in exchange for shares in the fibre network(s). The terms of these deals will be the crux of it but Mr Hallwright, for one, believes Telecom now has more upside than down. This week, he upped his Telecom rating from hold to "accumulate." He now stands alone, across Australasia, as the only analyst with a buy rating on the beleaguered telco.

## Toy box

### Scan or shred business cards

HP bills its Scanjet Professional 1000 Mobile Scanner (\$365) as the ideal tool for importing business cards to your PC and it comes with bundled BizCard software for this task.

I scanned a selection of business cards using the 1000. After a little calibration, it was almost letter-perfect, making barely any typos as it lifted contact details from each card.

And, semi-miraculously, BizCard nearly always allocated a person's name, and their company name, email, direct dial and mobile phone to the correct lines of its card database (which can be exported to Microsoft Outlook and other popular programmes).

Address details were also nearly note-perfect, yet were often put onto a single line, meaning a little manual cut-and-paste was in order to finish things off; the 1000 greatly speeds rather than fully automates the process.

The 1000 can also be used to scan any document or colour photo up to US letter (just over A4 size) at up to 600dpi. The scanner itself is just a little-finger longer than A4.

Handily for travellers, it draws power from the USB cable

that connects it to your laptop; there's no AC cable.

Of course, not every meeting goes well. Sometime, you want to lose a card rather than file it.

On my desk, I've coupled HP's scanner with a business card hand-shredder I picked up in Japan. It's extremely satisfying, and no one's going to walk past and see their card in your bin.

– Chris Keall

