

Section 201 – Geographically consistent pricing

Draft guidance on our intended approach to applying s 201 of the Telecommunications Act 2001

The Commission: Tristan Gilbertson

Sue Begg

Elisabeth Welson

John Crawford

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Associated documents

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| 15 September 2020 | Fibre information disclosure and price-quality regulation – proposed process and approach for the first regulatory period |
| 13 October 2020 | Fibre Input Methodologies – main final decisions reasons paper |
| 3 November 2020 | Fibre Input Methodologies (initial value of financial loss asset) Amendment Determination 2020 |
| 27 May 2021 | Chorus' fibre price-quality path from 1 January 2022: draft decisions – reasons paper |
| 27 May 2021 | Section 201 – Geographically consistent pricing: Consultation on our draft guidance |

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Introduction

1. This paper sets out our draft guidance on the application of s 201 of the Telecommunications Act 2001 (**the Act**) and is structured as follows:
 - 1.1 purpose and scope of draft guidance;
 - 1.2 background to s 201;
 - 1.3 relevance of the s 226 regulations;
 - 1.4 our general focus for the application of s 201 is the location of the end-user;
 - 1.5 our draft guidance on the application and enforcement of s 201:
 - 1.5.1 how s 201 interacts with s 198 – s 200;
 - 1.5.2 enforcement of s 201; and
 - 1.5.3 assessing whether FFLAS are ‘in all material respects the same’.

Purpose and scope of draft guidance

2. The Commerce Commission (**Commission**) is implementing price-quality (**PQ**) paths and information disclosure (**ID**) requirements in line with the requirements of the input methodologies (**IMs**) for regulated fixed fibre line access services (**FFLAS**) under Part 6 of the Act.
3. The Commission does not set the prices for individual services provided by regulated FFLAS providers (**regulated providers**). Rather, the Commission formulates PQ paths and ID requirements that regulated providers must comply with in providing and charging for FFLAS.
4. Section 201 of the Act, however, requires Chorus to set prices that are geographically consistent. It provides:

201 Geographically consistent pricing

A regulated fibre service provider who is subject to price-quality regulation must, regardless of the geographic location of the access seeker or end-user, charge the same price for providing fibre fixed line access services that are, in all material respects, the same.

5. A breach of s 201 is a breach of a price quality requirement and is subject to enforcement penalties.¹ Enforcing compliance includes, where necessary, seeking injunctive relief under s 218 or seeking pecuniary penalties under s 215.
6. In this paper, we set out our approach to the application and enforcement of s 201.

Background to geographically consistent pricing

7. Section 201 of the Act requires a regulated provider who is subject to PQ regulation to charge the same price for providing FFLAS that are in all material respects the same, regardless of the geographic location of the access seeker or end-user.
8. In other words, the price that Chorus, as a regulated provider subject to PQ regulation, charges for providing a service must be consistent across the geographic extent of New Zealand.²
9. The concept of geographically consistent pricing in telecommunications regulation was first introduced for copper services in 2011. The Commission is required to “determine a geographically averaged price” when setting the price for the unbundled copper local loop and unbundled bitstream access services (which are the principal copper broadband services offered by Chorus).³
10. Section 201 was intended to require Chorus to “charge the same price for a fibre service regardless of the location of the customer ... to ensure comparable pricing for all customers, and to discourage ‘pocket pricing’, where a regulated fibre provider could strategically drop prices in a geographic area to undermine competition.” It was so designed to avoid widening of the “digital divide” by requiring Chorus to charge the same price to rural and urban customers.⁴
11. To take a simple case, s 201 means that Chorus cannot charge a different price for providing a particular FFLAS in rural Southland to the price it charges for providing materially the same service in urban Auckland.

¹ Section 215(2)(b)(iii).

² This is subject to the proviso in reg 6: refer to paragraphs 12-17 below.

³ Clause 4A of Schedule 1 to the Act, introduced by Telecommunications (TSO, Broadband, and Other Matters) Amendment Act 2011, s 68; see Commerce Commission “Final Pricing Review Determination for Chorus’ Unbundled Bitstream Access Service” [2015] NZCC 38 (15 December 2015) at [309]-[312].

⁴ Telecommunications (New Regulatory Framework) Amendment Bill: Departmental Report to the Economic Development, Science and Innovation Committee – Initial Briefing (10 April 2018), at [74]-[77].

Relevance of section 226 regulations

12. Section 201 is linked to the Telecommunications (Regulated Service Providers) Regulations 2019 (**the Regulations**).⁵ The Regulations specify the providers that will be regulated, and what kind of regulation will apply to them – ID only regulation or both ID and PQ regulation.
13. The demarcation between ID and PQ regulation is important for the purpose of s 201, given that in our view, the requirement to offer geographically consistent pricing only applies to services that are subject to PQ regulation.⁶
14. Regulation 5 provides that all regulated providers will be subject to ID regulation.
15. Regulation 6 (**reg 6**) provides that only Chorus will be subject to PQ regulation for:⁷

All FFLAS, except to the extent that a service is provided in a geographical area where a regulated provider (other than Chorus) has installed a fibre network as part of the UFB initiative
16. We consider that the rationale for Parliament introducing the proviso was to ensure that Chorus was not subject to PQ regulation in areas where local fibre companies (**LFCs**) had built a network and were subject to ID regulation only “consistent with the regulatory framework which provides for less intrusive regulation where competition is present” and consistent with the principle that PQ regulation would only be imposed to the extent that Chorus faced insufficient competitive constraint on its services.⁸
17. The dividing line between PQ regulation and ID-only regulation under reg 6 depends on whether a service is provided in a geographical area where an LFC other than Chorus has installed a network under the UFB initiative.⁹

⁵ The Telecommunications (Regulated Fibre Service Providers) Regulations 2019 were made on 18 November 2019, and notified in the Gazette on 21 November 2019.

⁶ Our view remains the same as stated in our Fibre Input Methodologies final reasons paper. See Commerce Commission “[Fibre Input Methodologies – main final decisions reasons paper](#)” (13 October 2020), paragraph 2.71.

⁷ The Telecommunications (Regulated Fibre Service Providers) Regulations 2019, Regulation 6. Chorus is currently the only regulated provider subject to PQ regulation. Should any other regulated providers in future become subject to PQ regulation, this would apply equally to those providers.

⁸ Commerce Commission “[Fibre Input Methodologies – main final decisions reasons paper](#)” (13 October 2020), paragraphs 2.51 and 2.57.

⁹ In this paper, we refer to these areas as “LFC UFB areas”.

18. In our view, the language of reg 6, interpreted in light of its purpose, points to the location of the end-user as determining where the service was provided and thus whether PQ regulation or ID-only regulation applies. In particular, the rationale for price regulation of FFLAS depends on the competitive dynamic (or lack thereof) in respect of the end-users who are the ultimate recipients of the service, and who are the focus of the purposes set out in section 166(2) of the Act. The underlying purpose of reg 6 is to exempt Chorus from PQ regulation where it is subject to competitive constraints from other LFCs in respect of end-users.¹⁰
19. The consequence is that where Chorus supplies a service that is caught by the proviso in reg 6 (ie, to end-users in LFC UFB areas), Chorus is not subject to PQ regulation and is not required to supply FFLAS on a geographically consistent basis. As a result, Chorus could compete on price with other LFCs in the LFCs' UFB areas.¹¹

¹⁰ Commerce Commission "[Fibre Input Methodologies – main final decisions reasons paper](#)" (13 October 2020), paragraph 2.63.

¹¹ At the same time, the application of the s 226 regulations under Part 6 allows for separate FFLAS cost bases to be determined for Chorus for FFLAS subject to PQ regulation vs FFLAS subject to ID-only regulation. This approach limits Chorus' ability to strategically cross-subsidise prices for their services in the LFC UFB areas and recovering the costs through FFLAS offered in PQ regulated areas.

Our views on the substantive issues that affect the application of s 201

Our general focus for the application of s 201 is the location of the end-user

20. The majority of Chorus' FFLAS are subject to PQ regulation and must therefore be supplied on a geographically consistent basis.
21. As explained above, in our view the location of the end-user who is the ultimate recipient of the service determines whether the service is subject to PQ regulation and whether s 201 applies.
22. This approach is straightforward to apply for certain FFLAS where end-users can be identified. For example, for bitstream services that are supplied to identifiable end-users located in an LFC UFB area, PQ regulation does not apply, and as a result, Chorus would not be required to adhere to geographically consistent pricing for those FFLAS.¹²
23. However, the position is more nuanced when applying reg 6 to services that support multiple (and possibly dispersed) end-users, including in particular aggregated services. Our position on how we will determine whether PQ regulation applies to aggregated FFLAS is explained in our PQ draft decisions reasons paper.¹³

Draft guidance on the application and enforcement of s 201

24. In this section we provide draft guidance about our understanding of the meaning and operation of s 201, and the considerations we intend to take into account in exercising our enforcement function.

¹² In submissions Chorus supported this approach. See Chorus "Submission on Fibre input methodologies – further consultation draft reasons paper" (13 August 2020), paragraph 10.

¹³ See Commerce Commission "Chorus' fibre price-quality path from 1 January 2022: draft decisions – reasons paper" (27 May 2021), Attachment J.

How s 201 interacts with s 198 – s 200

25. The Act allows the Minister to recommend the declaration of anchor services, specifying the description, conditions, period and price of the service. Where an anchor service has been declared, Chorus is required to provide it on the prescribed terms. In accordance with s 201, the price for an anchor service will be the same regardless of where in the country the service is provided.¹⁴ The Act also provides for the declaration of direct fibre access services (**DFAS**) and point-to-multipoint layer 1 services.¹⁵
26. We expect that anchor services will be prescribed on the Minister's recommendation before the Part 6 implementation date. The initial anchor services will have a price and description based on the terms of the UFB contracts.¹⁶
27. Except where anchor or other services have been declared, Chorus may determine the specifications, terms and prices of the FFLAS that it supplies, in accordance with the requirements of the IMs and PQ determinations and subject to an overall revenue cap set by the Commission.¹⁷

Enforcement of s 201

28. Section 201 provides that where Chorus supplies FFLAS that is "in all material respects, the same" in more than one geographic location, then it must charge the same price for that service wherever it is supplied.
29. Section 201 does not impose an obligation on Chorus to supply FFLAS (of any particular kind or in any particular location). Rather, it provides that where Chorus supplies FFLAS that is in all material respects the same in different locations, it must charge the same price for the service.
30. Chorus bears responsibility for ensuring that its pricing decisions comply with the requirements of s 201. Chorus also has full knowledge of the suite of services it provides across the country. Chorus is therefore best placed to ensure that where it supplies materially the same service in different locations, the service is provided at the same price.¹⁸

¹⁴ Telecommunications Act 2001, ss 198 and 227.

¹⁵ Telecommunications Act 2001, ss 199 and 228 (DFAS); ss 200 and 229 (point-to-multipoint service) respectively.

¹⁶ Telecommunications Act, Schedule 1AA, clause 14.

¹⁷ Telecommunications Act 2001, s 195. This is in contrast to copper services regulated under Part 2 of the Act, where the Commission sets the price that Chorus charges.

¹⁸ We consider that the reference to 'the same price' in this context is to the price actually paid by access seekers once any adjustments, rebates or discounts have been accounted for.

31. The Commission has responsibility for maintaining oversight of Chorus' decisions and, if necessary, bringing enforcement action.¹⁹ The Commission may exercise any of its powers under the Act for the purpose of monitoring compliance by regulated providers with regulation under Part 6.²⁰ More specifically, the Commission has the power to issue a written notice requiring Chorus to provide a written compliance statement.²¹
32. As explained above, s 201 applies to all FFLAS supplied by Chorus that are subject to PQ regulation. We expect s 201 to work alongside declared services (ie, anchor services, DFAS, and unbundled fibre services) to achieve the overall purposes of Part 6.
33. By enacting s 201, Parliament intended to ensure geographically consistent pricing between urban and rural areas and in particular to avoid end-users in more remote or sparsely populated parts of New Zealand paying a higher price for FFLAS than end-users in urban or densely populated areas. Parliament also intended to prevent Chorus from selectively dropping prices in particular areas to deter competition that might otherwise develop, in particular from competing technologies like fixed wireless access.
34. An application of the approach in paragraph 33 is that Chorus would be constrained from implementing cost-based differentiation in the provision of services between different geographical areas subject to PQ regulation.
35. We expect Chorus to ensure that its pricing decisions promote, and can be seen to promote, these objectives, and we will have regard to these objectives in exercising our monitoring and enforcement obligations.

Assessing whether FFLAS are “in all material respects the same”

36. In terms of assessing whether FFLAS are “in all material respects the same” for the purpose of s 201, we provide the following guidance:
 - 36.1 section 201 contemplates a substantive enquiry into the characteristics of the services being offered, meaning the name or label applied to the service is not relevant.

¹⁹ Enforcing compliance includes, where necessary, seeking injunctive relief under s 218 or seeking pecuniary penalties under s 215. These remedies are available where a provider has contravened a price-quality requirement, which is defined in s 215(2)(b)(iii) to include s 201.

²⁰ Telecommunications Act 2001, s 167(4).

²¹ Telecommunications Act 2001, s 193(2).

- 36.2 Contractual terms, technical specifications, and actual performance (quality) may all be relevant when assessing whether two services are materially the same. For example, two services that are offered on the same contractual terms but with different technical specifications may not be the same; likewise two services that have the same technical specifications but in fact have different performance characteristics may not be the same.
- 36.3 Differences that are (wholly) attributable to the location of the end-user must be disregarded for the purpose of assessing whether services are materially the same. For example, Chorus could not change the price charged for a bitstream service by reference to the distance between the end-user's premises and the central office.
- 36.4 The end-user experience of a service must be at least a relevant consideration in assessing the equivalence of different services.
37. We expect Chorus to continue its practice of formulating services by reference to published service descriptions and standard terms, and then offering those services at the same price, irrespective of the location of the end-user. We would examine closely any evidence of Chorus formulating different services for different parts of the country, particularly where this had the effect of depriving end-users in some parts of the country from an equivalent service at an equivalent price to end-users in other parts of the country. Likewise, we would be particularly concerned if there was reason to believe that Chorus had structured its business, operations or prices to take advantage of the proviso to reg 6 in such a way that end-users located outside the LFCs' UFB areas did not have the protection of PQ regulation.
38. The qualification in s 201 that any difference between services is "material" ensures that differences that are minor or trivial are disregarded. It also ensures that Chorus cannot rely on small differences between substantially similar services to justify differential pricing. Our particular focus in applying s 201 is on protecting end-users of residential services. For example, if Chorus were to formulate different services with minor differences in specification that resulted in end-users in higher-cost (rural) areas receiving a poorer quality service at a higher price, or end-users in areas of potential competition receiving a service at a price level that would not allow competition to develop.
39. We invite stakeholders' views on the approach we have outlined above.