ENABLE NETWORKS LIMITED AND ULTRAFAST FIBRE LIMITED

SUBMISSION ON NZCC DRAFT GUIDANCE ON ITS INTENDED APPROACH TO APPLYING S 201 OF THE TELECOMMUNICATIONS ACT 2001

24 JUNE 2021

PUBLIC VERSION

1. Introduction

1.1 The Commission is consulting[1] on the interpretation of s 201 of the Telecommunications Act 2001 (the **Act**) which provides that a fibre provider subject to price quality regulation (i.e. Chorus) "*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*".

1.2 The Commission's draft guidance is that "*the requirement to offer geographically consistent pricing only applies to services that are subject to PQ regulation*",[2] with the result that Chorus is not obliged to price its fibre services on a geographically consistent basis in our respective UFB areas.

1.3 It is our submission that the Commission's interpretation of s 201 is wrong. It is clear from both the plain meaning of the wording of s 201 and the policy intent of the pricing restriction, that Chorus must charge its wholesale customer the same price for a fibre fixed line access service (**FFLAS**) regardless of whether the end user of the service is located in a Chorus UFB coverage area, our respective UFB coverage areas, or an area outside the UFB coverage areas.

2. The words of s 201

2.1 Section 201 provides that a fibre provider subject to price quality regulation must charge the same price for providing FFLAS "*regardless of the geographic location of the …end-user".*

2.2 There is no ambiguity in this wording – once an FFLAS provider is declared to be subject to price-quality regulation in any location, it has an obligation to offer the same price for FFLAS in all end user locations.

2.3 Surprisingly, the Commission does not discuss in the Draft Guidance, or put any weight on, the words "*regardless of the geographical location of the end user*" in s 201. Instead it relies on the wording of reg 6 of the Telecommunications (Regulated Fibre Service Providers) Regulations 2019, which provides that Chorus will be subject to PQ regulation for "*all FLAS, 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*" to conclude that:

(a) "*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*";[3]

(b) "*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*";[4] and

(c) *"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*".[5]

2.4 The Commission applies s 201 as if the proviso in reg 6 were part of the section: "*regardless of the geographical location of the end-user* ***except to the extent the end-user is located in a geographical***

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[1] NZCC *Section 201 – Geographically consistent pricing - Draft Guidance on our intended approach to applying s 201 of the Telecommunications Act 2001* 27 May 2021 (**Draft Guidance**).

[2] Draft Guidance [13].

[3] Draft Guidance [16].

[4] Draft Guidance [18].

[5] Draft Guidance [19].

***location where a regulated provider (other than Chorus) has installed a fibre network as part of the UFB initiative**".*

2.5 The errors in the Commission's reasoning are self-evident:

(a) the general rule is that regulations or other delegated legislation made under an Act can be used as a guide to the meaning of the Act only in exceptional circumstances.[6] They are made by different bodies, and cannot alter the meaning of the empowering legislation without specific authority in that legislation.[7]

(b) The House of Lords has held that regulations may be used in the interpretation of an Act where the meaning is ambiguous and "*the Act provides a framework built on by contemporaneously prepared regulations*".[8] This approach has been adopted in New Zealand:

> *The circumstances in which regulations may be considered as an aid to the interpretation of a statute are limited. In short, the general rule is that the regulations must be contemporaneous with the statute, and the statute itself must be ambiguous.*[9]

(c) Neither element is present in this case:

(i) the regulations were not contemporaneous with the statute (s 201 was inserted into the Act on 13 November 2018 by s 24 of the Telecommunications (New Regulatory Framework) Amendment Act 2018; the Regulations promulgated on 18 November 2019); and

(ii) the words "*regardless of the geographic location of the …end -user*" are not ambiguous.

3. The policy intent of s 201

3.1 The Commission's proposed interpretation is also inconsistent with the purpose of s 201, which was two-fold:

(a) to reduce the digital divide by ensuring end-users in rural areas paid the same price as urban end-users; and

(b) to discourage "pocket pricing".

3.2 "Pocket pricing" is "*the ability of incumbents to offer differential pricing to certain customer groups - either geographical or by segment*"[10] As the Commission has noted "*entry or expansion into a market could be constrained by an incumbent's differential customer pricing.*"[11]

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[6] R v Maginnis [1987] AC 303 (HL) per Lord Keith at 306.

[7] Campbell v ACCC (CA138/03. 29 March 2004) per William Young J at [52].

[8] Hanlon Law Society [1981] AC 124 (HL) at 193.

[9] Mainfreight Ltd v Police [1997] 3 NZLR 688 (CA) per Tipping J at 692.

[10] NZCC *A Review of Cellular Mobile Market Entry Issues* 10 October 2006 (**Mobile Review**) [77].

[11] Mobile Review [76].

3.3 Consistent pricing across UFB providers was intended to be a feature of the UFB fibre regime from the outset of the consultation process which preceded the enactment of Part 6.[12] In our submission (with Northpower) on MBIE's July 2016 Options Paper we said:

> *As proposed in the Options Paper, geographic averaging would prevent Chorus from pocket pricing its services in LFC areas, and we support this.*[13]

3.4 What is now s 201 of the Act originally appeared in the Telecommunications (New Regulatory Framework) Bill as s 200. Chorus submitted "*the geographically consistent pricing requirement should be removed*" because it "*could impact on our ability to carry out pro-consumer initiatives*."[14]

3.5 The Departmental Report to the Select Committee recommended no change be made because:

(a) "*in the short to medium term, de-averaging urban and rural prices is likely to exacerbate the digital divide*";[15] and

(b) "*the legislation provided Chorus must charge the same price for a fibre service regardless of the location of the customer. This is 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*".[16]

3.6 Parliament did not change the wording of the section, which became s 201 in the Amendment Act. It is clear from this legislative history the section was intended to prevent Chorus from charging less in LFC areas for FFLAS than it charged in its own UFB areas, because it only faces competition in LFC areas.

3.7 The requirement was adopted by Parliament because of a concern that otherwise "*a regulated fibre could strategically drop prices in a geographic area to undermine competition*".[17] In contrast, the Commission concludes that the restriction does not apply where "*Chorus supplies a service…to end-users in LFC UFB areas*"[18] "*in a geographic area where a regulated provider (other than Chorus) has installed a fibre network as part of the UFB initiative*"[19], referring to its analysis at paragraphs 2.70 – 2.74 of fibre input methodologies reasons papers on 13 October 2020.[20]

3.8 Its reasoning as set out in the Final Reasons Paper was that Parliament intended s 201 to apply only to services subject to PQ regulation, and not services subject to ID regulation only, because:

(a) s 201 is within subpart 6[21] (concerned with PQ regulation);

(b) in other parts of the Act regulation is described by reference to the regulated provider providing the services when it is clear the intention is only to capture the regulated provider to the extent

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[12] MBIE *Telecommunications Act Review: Options Paper* July 2016 [7.2.5].

[13] Enable, Ultrafast Fibre and Northpower *LFC submission on MBIE Options Paper* 2 September 2016 [77].

[14] Chorus *Submission on the Telecommunications (New regulatory Framework) Amendment Bill 2017* 2 February 2018 [131].

[15] Telecommunications (New Regulatory Framework) Amendment Bill: *Departmental Report to the Economic, Science and Innovation Committee (***Departmental Report***)* (10 April 2018) [74].

[16] Departmental Report [71] (own emphasis).

[17] Departmental Report [71] (own emphasis).

[18] Draft Guidance [19].

[19] NZCC *Fibre Input methodologies – Main final decisions reasons paper*13 October 2020 (**Final Reasons Paper**).

[20] Commerce Commission "Fibre input methodologies: Main final decisions – reasons paper" (13 October 2020).

[21] This is an error; subpart 5 is the relevant part of Part 6.

that they provided services subject to PQ regulation.[22] The Commission gives as an example s 193 which provides that a service provider subject to PQ regulation must apply the price quality paths set by the Commission in a s 170 determination, and says "*it is clear that the provider is only required to apply PQ paths to those services that are subject to PQ regulation*";[23]

(c) the requirement in s 226(2) that regulation describe the services subject to PQ regulation would be frustrated "*if some elements of PQ regulation (ie, the requirement to price services on a geographical consistent basis) applied on a blanket basis to all services*";[24] and

(d) "*in the case of geographical areas where other LFCs provide FFLAS, Chorus' ability to compete with those LFCs could be frustrated if it were required to price its FFLAS on a geographically consistent basis*".[25]

3.9 None of these reasons justify the Commission's interpretation:

(a) that s 201 is in subpart 5 of Part 6 of the Act dealing with price-quality regulation does not support a conclusion that Parliament intended that the geographically consistent pricing obligation be limited to end-users within Chorus' PQ areas. As only "*a regulated fibre service provider who is subject to price-quality regulation"* is required to charge the same price for fibre services it is appropriate that s 201 is in subpart 5. The scope of the obligation is not however determined by where s 201 is placed in the Act, but rather by the wording of s 201, which unequivocally provides the obligation extends to the supply of fibre services to all end-users regardless of their geographic location;

(b) that s 193 only captures services subject to price quality regulation does not mean than the same applies to s 201. Just as it is clear from the wording of s 201 that the obligation applies to all end users regardless of their geographic location, it is clear from the wording of s 193 that it applies only to services subject to PQ regulation. Section 193(1) provides that a service provider who is subject to price-quality regulation of fibre fixed line access services must apply the price-quality path set by the Commission **in respect of those services;** whereas s 201 requires the provider to charge the same price for fibre services regardless of the geographic location of the end user;

(c) section 226 is not "frustrated" by the wider scope of s 201. It sets out the requirements for regulations made under than section, and those regulations can specify the geographic area in which a service subject to price-quality regulation is supplied.[26]. The obligation to charge the same price for FFLAS is not contained in regulation made under s 226, but in the Act; and whereas the regulation may define the geographic area in which the service is supplied, the obligation in s 201 applies regardless of the location of the end-user of the service; and

(d) if the Commission were correct, the protection from pocket pricing that Parliament intended the Act to provide would not exist. Chorus does not face competition in areas where it is subject to PQ regulation so pocket pricing is not an issue. It only faces competition in the LFC UFB areas. and only in those areas could it "If s 201 does not apply in those locations, it would not be able to "*discourage pocket pricing, where a regulated fibre provider could strategically drop prices to undermine competition*" as Parliament intended.

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[22] Final Reasons Paper [2.72].

[23] Final Reasons Paper [footnote 32].

[24] Final Reasons Paper [2.73].

[25] Final Reasons Paper [2.74].

[26] s 226(3)(a).

3.10 Section 201 is unambiguous. Chorus is required to charge the same price for fibre services to all end users, not simply those located in Chorus price-quality locations. "The words "*regardless of the geographical location of the end-user*" would not have been necessary if the obligation was intended to be confined to end-users located in Chorus UFB areas as the Commission contends in its Draft Guidance.

3.11 We submit that the Commission must correct this error in its final guidance.

END.