

Intended implementation approach for [Draft] Fibre Input Methodologies Determination 2020

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Associated documents

Publication date	Reference	Title
11 December 2019	ISBN 978-1-869457-78-5	[Draft] Fibre Input Methodologies Determination 2020
19 November 2019	ISBN 978-1-869457-73-0	Fibre input methodologies: Draft decision – reasons paper

Commerce Commission
Wellington, New Zealand

Purpose of this document

1. This document sets out:
 - 1.1. important features of our intended implementation approach for our [Draft] Fibre Input Methodologies Determination 2020 (**draft determination**), which is published on 11 December 2019 alongside this document; and
 - 1.2. how interested persons can give their views on our draft determination.
2. Under the Telecommunications Act 2001 (**the Act**), the Commerce Commission (**Commission**) is required to determine input methodologies (**IMs**) for regulated fibre fixed line access services (**FFLAS**) no later than 1 January 2022. On 19 November 2019 we published our draft decisions on the IMs for regulated FFLAS (**draft decisions**),¹ and on 11 December 2019 we published our draft determination.² Our draft determination is the draft legal text (that is, our draft IMs) which would give effect to our draft decisions on regulated FFLAS.
3. When we reach our final decisions on regulated FFLAS, implementing those decisions in a determination will require us to exercise a degree of judgement. This document sets out our current thinking on how we intend to implement some of our final decisions, based on our current draft decisions.

Structure of this document

4. This document:
 - 4.1. outlines the requirement to determine IMs for regulated FFLAS, as specified in paragraphs [5]-[9];
 - 4.2. explains that provisions for Type II asymmetric risks have been included in the Asset Valuation IM, as specified in paragraph [10];
 - 4.3. explains our intended implementation approach for connection capex baseline proposals, as specified in paragraphs [11]-[14];
 - 4.4. explains that our draft determination is based on the exposure draft of the first regulations made under s 226 of the Act, rather than the Telecommunications (Regulated Fibre Service Providers) Regulations 2019, as specified in paragraphs [15]-[16];
 - 4.5. explains that we have used square brackets for certain clauses and definitions in our draft determination as placeholders for the draft IM on Regulatory Processes and Rules, as specified in paragraph [17];
 - 4.6. describes material we propose incorporating by reference into the IMs for regulated FFLAS, as specified in paragraphs [18]-[23]; and

¹ Commerce Commission “Fibre input methodologies: Draft decision – reasons paper” (19 November 2019).

² A copy of our draft determination ‘[Draft] Fibre Input Methodologies Determination 2020’ is available via the Commission’s fibre IMs project page here: <https://comcom.govt.nz/regulated-industries/telecommunications/projects/fibre-input-methodologies>.

- 4.7. explains how you can provide your views on the draft determination, as specified in paragraphs [25]-[28].

We are required to determine IMs for regulated FFLAS

5. The Commission is required to determine IMs for regulated FFLAS under Subpart 3 of Part 6 of the Act by no later than the implementation date (**1 January 2022**).³
6. The IMs are key upfront regulatory rules, requirements and processes that relate to how we regulate FFLAS. The IMs are intended to promote certainty for regulated fibre service providers (**regulated providers**), access seekers and end-users.⁴
7. We published our draft decisions and reasons on the IMs for regulated FFLAS on 19 November 2019.⁵ Submissions on our draft decisions and reasons are due by 5pm, 28 January 2020. We will then provide the opportunity for interested persons to provide views on the submissions on our draft decisions and reasons by inviting cross-submissions. Cross-submissions are due by 5pm on 12 February 2020.
8. We published our draft determination for regulated FFLAS on 11 December 2019. As required by s 179(2)(a) of the Act, we have given public notice of our draft IMs in the *Gazette*.
9. Our draft determination is the draft legal text that seeks to give effect to our draft decisions for IMs for regulated FFLAS.⁶ When we reach our final decisions on IMs for regulated FFLAS, implementing those decisions will require us to exercise a degree of judgement. This document sets out, on the basis of our draft decisions, how we intend to ultimately implement the final decisions.

Why we have included provisions concerning Type II asymmetric risks in the Asset Valuation IM

10. The *ex-ante* allowance for asset stranding is contained in clause 3.2.5 of the draft determination.⁷ This allowance is to provide compensation for non-systematic risk and hence does not form part of the Cost of Capital IM. We have included the provisions for this allowance within the Asset Valuation IM in the draft determination to prevent confusion.

Our intended implementation approach for connection capex baseline proposals

11. The Chorus Capex IM chapter of our draft decisions and reasons paper (from p 422) sets out draft information requirements for proposals by Chorus seeking capital expenditure. Those requirements are intended to enable our evaluation and approval of this expenditure. One of these draft information requirements is the ‘connection capex baseline proposal’.

³ Telecommunications Act 2001, s 178.

⁴ Telecommunications Act 2001, s 174.

⁵ Commerce Commission “Fibre input methodologies: Draft decision – reasons paper” (19 November 2019).

⁶ Commerce Commission “Fibre input methodologies: Draft decision – reasons paper” (19 November 2019).

⁷ The draft decision is summarised in Commerce Commission “Fibre input methodologies: Draft decision – reasons paper” (19 November 2019), paragraphs 3.1274.2-3.1274.3.

12. Our draft decisions on the connection capex baseline proposal focused on forecasting connection capex, but did not prescribe the form and content of this information or a process by which it is gathered by the Commission. The draft determination provides this detail.
13. We consider that the information requirements and process for connection capex baseline and base capex proposals should be similar and consistent, since they will both be developed at the same time. Both the base capex proposal and the connection capex baseline proposal must be submitted to us by Chorus before the regulatory period commences.
14. Under clause 3.6.13 of the draft determination (“Connection capex baseline proposal process and timeframes”), a connection capex baseline proposal will include two of the same elements as a base capex proposal. There will be a regulatory template, either agreed to by Chorus and us, or if there is no agreement, specified by us. The regulatory template will provide the form and content of the required information on forecast connection capex. In addition, we will issue an information request to Chorus relevant to the connection capex baseline proposal. These two elements will provide transparency and regulatory certainty for Chorus and other interested persons regarding connection capex in the same way as for base capex.

Our draft determination is based on the exposure draft of the first regulations

15. In the same way as our draft decisions and reasons paper, our draft determination is based on the exposure draft of the first regulations under s 226 of the Act published by the Ministry of Business, Innovation and Employment on 6 June 2019,⁸ rather than the Telecommunications (Regulated Fibre Service Providers) Regulations 2019 (**Regulations**), which were notified in the *Gazette* on 21 November 2019, after the draft decisions and reasons paper was released.
16. As the final form of the Regulations differs from the exposure draft, we will consult with interested persons on the impact of this difference for our IM decisions and the draft determination.⁹

We have used square brackets for certain clauses and definitions as placeholders for provisions in the Regulatory Processes and Rules IM

17. We have used square brackets for certain clauses and definitions in the draft determination to indicate that these matters are yet to be defined. These will be defined as part of our draft decision on the IM for Regulatory Processes and Rules, which we intend to publish in March 2020.

⁸ Ministry of Business Innovation & Employment, “Exposure draft of regulations to be made under section 226 of the Telecommunications Act 2001” (6 June 2019).

⁹ The exposure draft of the first regulations made under s 226 prescribed that, in respect of persons subject to price-quality regulation, “all fibre fixed line access services” are subject to regulation. The Regulations, prescribe that, in respect of persons subject to price-quality regulation, “all fibre fixed line access services, except to the extent that a service is provided in a geographical area where a regulated fibre service provider (other than Chorus Limited) has installed a fibre network as part of the UFB initiative” are subject to regulation.

We propose incorporating NZ IAS 24 by reference

18. The Asset Valuation chapter of the draft decisions and reasons paper sets out our intended valuation rules for transactions involving a related party.¹⁰ In summary, the cost of a commissioned asset — or component of a commissioned asset — acquired in a related party transaction must be given a value not greater than that of an arm’s-length transaction. In determining the terms of an arm’s-length transaction, an objective and independent measure must be used. This valuation rule is also used under Part 4 regulation in respect of electricity distribution services and gas pipeline services.¹¹
19. To give effect to this draft decision, we propose incorporating the definition of ‘related party’ from *New Zealand Equivalent to International Accounting Standard 24, Related Party Disclosures (NZ IAS 24) (NZ IAS 24)*, into the draft determination by reference, in accordance with the process set out in s 223 of the Act.¹²
20. Section 223(b) of the Act provides that, where the Commission wishes to incorporate material by reference into an IM for regulated FFLAS to be made under Part 6 of the Act, the process for incorporation by reference in Schedule 5 of the Commerce Act 1986 (**Commerce Act**) applies with any necessary modifications.
21. Schedule 5 of the Commerce Act sets out the process for incorporating material by reference into an IM. It allows us to incorporate material by reference into an IM if:¹³
 - 21.1. the material deals with technical matters; and
 - 21.2. it is impractical to include it or publish it as part of the IM.
22. The accounting standard is technical in nature. We also consider that it would be impractical to include it in the determination itself due to its length.
23. The accounting standard must be incorporated in the form in which it exists at the time the determination is published, and will have legal effect as part of the determination.¹⁴ Any subsequent changes to NZ IAS 24 will not be automatically incorporated into the regulated FFLAS IMs, although the Commission can adopt the revised text in the manner outlined in clause 5 of Schedule 5 of the Commerce Act.
24. As required by clause 7(2)(d) of Schedule 5 of the Commerce Act, we have given public notice in the *Gazette* of how copies of NZ IAS 24 may be inspected and purchased, and

¹⁰ Commerce Commission “Fibre input methodologies: Draft decision – reasons paper” (19 November 2019) at [3.323] - [3.328], pp 158-159.

¹¹ Commerce Commission “Input methodologies review – related party transactions, Final decision and determinations guidance” (21 December 2017) https://comcom.govt.nz/__data/assets/pdf_file/0029/59591/Related-party-transactions-InputMethodologies-review-Final-decision-and-determinations-guidance-21-December-2017.pdf

¹² Issued by the New Zealand Accounting Standards Board of the External Reporting Board in November 2009, incorporating amendments to 31 December 2015.

¹³ Commerce Act 1986, cl 2(1) of Schedule 5.

¹⁴ Telecommunications Act 2001, s 223; Commerce Act 1986, Schedule 5, clause 2(3). Later amendments to or replacements of the accounting standard are not automatically incorporated into, and have legal effect as part of, the determination. This will only occur if a subsequent determination or IM states that the amendment or replacement has legal effect as part of the determination or IM, or the Chairperson of the Commission adopts the amendment or replacement as having legal effect by notice in the *Gazette* (Schedule 5, clause 5).

how interested persons may provide comments on our proposal to incorporate NZ IAS 24 by reference.

We want to hear your views

25. We invite submissions on our draft determination from all interested persons, including regulated providers, retail service providers and end-users.
26. We invite submissions on any and all aspects of our draft determination. We have avoided identifying specific questions for submitters, so that submitters do not feel constrained on the matters they can discuss in their submissions. Wherever possible, submissions should be structured according to methodology (in line with the structure of the draft determination).
27. Please make your submission via the Commission's fibre IMs project page by **5pm, 28 January 2020**.¹⁵ The project page will direct you to a form with instructions on how to upload your submission. Your submission should be provided as an electronic file in an accessible form.
28. We will then provide the opportunity for interested persons to provide views on the submissions on our paper by inviting cross-submissions. You will have until **5pm, 12 February 2020** should you wish to make a cross-submission.
29. The deadlines for submissions and cross-submissions on the draft determination are the same as for the draft decisions and reasons paper.

Confidentiality

30. The protection of confidential information is something the Commission takes seriously. To ensure we continue to protect confidential submissions, we are trialling a new submission process. When you upload your submission via the form on the Commission's fibre IMs project page, the process requires you to provide (if necessary) both a confidential and non-confidential version of your submission and to clearly identify the confidential and non-confidential versions.
31. When including commercially sensitive or confidential information in your submission, we offer the following guidance:
 - 31.1. Please provide a clearly labelled confidential version and public version. We intend to publish all public versions on our website.
 - 31.2. The responsibility for ensuring that confidential information is not included in a public version of a submission rests entirely with the party making the submission.
32. If we consider disclosure of information contained in the confidential version to be in the public interest, we will consult with the party that provided the information before any such disclosure is made.

¹⁵ You can find our fibre IMs project page here: <https://comcom.govt.nz/regulated-industries/telecommunications/projects/fibre-input-methodologies>.