

Submissions by the Auckland District Law Society to the NZ Commerce Commission on the Copper Withdrawal Code

06 July 2020

1. Background

- 1.1. The Auckland District Law Society Incorporated ("ADLS") is an independent membership organisation for the NZ legal profession that has around 5,000 members. ADLS maintains a number of expert committees that support legal review and policy advocacy on legal issues. This submission has been prepared by ADLS' *Technology and Law Committee*.
- 1.2. We have reviewed the proposed copper withdrawal code and submit the following amendments to align the code with the purpose to better protect consumers while maintaining the purpose of the amendments in furthering the enhancement of New Zealand's connectivity in the new fiber environment.
- 1.3. Our Submission:
 - (a) Identifies one area where the wording of clause 9 of the *Draft Copper Withdrawal Code* ("the Code") diverges from the policy choices adopted in chapters 4 and 5 of the *Copper Withdrawal Code Decisions and Reasons Paper* ("the Reasons Paper") and outlines a proposed amendment (see Paragraph 2 below).
 - (b) Advocates an additional 'reasonableness' requirement for the notification processes to end-users, in addition to mandatory notices, to provide protection for consumers against high costs for services where they are unable to service these costs in the time frame provided, if ever (see Paragraph 3 below).
 - (c) Notes that addressed mail is likely to be the best method for giving notice to end-users and provide them sufficient time to adjust (see Paragraph 4 below).

At the end of this submission there is an Appendix with suggested amendments to the Code, to give effect to the changes suggested in paragraphs 2 and 3 of this submission.

2. Divergence between clause 9 and the Reasons Paper

We propose that the: 6-month, 3-step notice procedure from Chorus to end-users should be mandatory

- 2.1. Paragraphs 113 and 114 of the Reasons Paper introduce *mandatory* notice periods for notice to end users that copper services will end:
- (a) 6 months' notice ("first notice"),
 - (b) 3 months' notice ("further notice"), and
 - (c) 20 working days' notice ("final notice").

Table 4 of the Reasons Paper repeats this mandatory 3-notice process. Paragraphs 146 and 147 make clear the intention that this process should be mandatory in the Code.

- 2.2. We argue that it is important that this three-step process is mandatory in the Code as this process provides the fundamental notification to end-users of the changes, so that users with unique needs have time to seek and adopt new technology, and plan for the possible increased costs associated with doing so (such as UPS deployment, battery operated devices and so on). However, the current wording of the three-notice process is not mandatory which gives rise to potential consumer difficulty.

Currently clause 11 of the code provides that if Chorus follows the suggested process then it is deemed to have followed 'a reasonable process', while Clause 9 of the Code makes mandatory only that Chorus must give 'reasonable notice'. The concern and divergence here is that Chorus could choose to follow a lesser process and then argue after the fact that its chosen process was reasonable.

- 2.3. We submit that Clause 9 in its current form is inconsistent with the Reasons Paper and suggest an amendment to section 10 to make the three-step notice process mandatory to remove this oversight; we have provided a draft amendment under the header '***Delete the current clauses 9 and 10 of the Code and replace with***' in the Appendix to this submission.

3. The need to add a reasonableness requirement in the mandatory three-step notice process

We suggest the need for the additional requirement that notice to end-users and property owners be defined with a reasonable requirement to protect consumers.

- 3.1. For a small number of end-users, cutting off copper phone lines without effective notice has the potential to have a major effect on their lives. Therefore, in some circumstances, a Chorus' needs to qualify how the effect of copper removal will affect the consumer before executing the three mandatory notice steps. This qualification is needed to ensure that end-users do, in fact, receive reasonable notice of the withdrawal of copper services and are not faced with a mandatory disconnect that connects them to a fiber service that they cannot afford to adopt.

Some consumers will be faced with the need for traditional telephone services that may see them facing high costs in replacing devices that they:

- (a) Do not know how to properly operate
- (b) Does not operate in the event of a power failure
- (c) Does not have an immediate hardware alternative

In these situations, amongst others, qualification should be undertaken to confirm that removal of the copper service will not impact the end consumer. To our mind, the ability for Chorus to provide notice with no consumer protection is of concern and we therefore argue:

- 3.2. A general 'reasonableness' requirement for notice to end-users supports the consumer-protection goals of the Code to make sure that all reasonable steps are taken to minimise the potential impact and harm to end-users due to unforeseen changes to the copper service that the consumer has no technical ability to foresee, but the provider does. We say this because under the current Code there is a gap which does not quite achieve this protective element because Chorus would be able to use the safe harbour provision provided by clause 11 to say its actions are 'reasonable' in circumstances where an outsider would see a need for further reasonable inquiry and notification action.
- 3.3. This 'reasonableness' element also supports the Commission's decision not to include a CWC operations manual in the Code (see paras 251 and 252 of the Reasons Paper). This decision is understandable because it does seem onerous to try and define detailed processes before the withdrawal process occurs. However, in the absence of an operations manual, a 'reasonableness' element means that, over time, Chorus is required to review its processes and add effort where necessary to ensure that users receive reasonable notice of changes that affect them as well as use every effort to protect consumers as far as possible.
- 3.4. To support consumer protection, we have, in the Appendix below, added an obligation in addition to following the mandatory 3-notice process for Chorus' to add reasonable notice to end users.
- 3.5. We have also considered the position of property owners where said notices are to be provided. In some ways they are consumers in a similar vulnerable position to end-users and some property owners may also have a relationship with vulnerable end users which means they are the best conduit of information to those end users. Therefore, in the Appendix below we have included a new clause 10.2 that mirrors the 'reasonableness' obligation in our suggested clause 9.4.
- 3.6. **Please note:** In the Appendix, we suggest wording for clauses 9 and 10 of the Code to include an obligation for Chorus to take '*all reasonably practical steps*' to give notice. The choice of the words 'all reasonably practical steps' is because these words have previously been considered by the Courts in relation to health and safety laws, and because these words give Chorus the opportunity to take into account whether the cost of additional actions is

commercially reasonable in the circumstances. That commercial balance seems appropriate in this context.

4. Best practice is for notice to end-users to be by addressed mail

- 4.1. One minor issue that arose during our review of the proposal was whether the notices needed to be by addressed mail (rather than being in the form of mail-drop flyers). Our view is that notices to end-users should be mandated by the code and include the need for notices to be sent by addressed mail to the end user, or the property owner who should be advised to notify their tenant or end user. This is important to ensure that notices are in-fact delivered, and that they are not discarded as 'junk mail'.



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APPENDIX: Suggested Amendments to the Draft Copper Withdrawal Code

Please note: The amendments below *do not* adjust the numbering of the Code. E.g. in the suggested clause 9.2 below, reference to clauses 12 to 16 is a reference to the current clauses 12 to 16.

We suggest to:

Delete the current clauses 9 and 10 of the Code and replace with:

9. *Chorus must give notice of the proposed withdrawal of a copper service as follows:*
 - 9.1. *for an end-user, Chorus must give notice as required by clauses 12 to 16; and*
 - 9.2. *for the relevant fibre service provider, Chorus must give notice as required by clauses 18 and 20; and*
 - 9.3. *for the end user's retail service provider, Chorus must give notice as required by clauses 22 and 24; and*
 - 9.4. *Chorus must, in addition to giving notice as required by clauses 9.1, take all reasonably practical steps to give reasonable notice to the end-user.*

10. *In addition to Chorus' obligations under clause 9, if the end-user is not the property owner of the premises where the copper service is being supplied to, Chorus must:*
 - 10.1. *Give to the property owner of that premises notice as required by clause 25; and*
 - 10.2. *in addition to giving notice as required by clauses 10.1, take all reasonably practical steps to give reasonable notice to the property owner.*

Delete the current clauses 11, 17, and 21 of the Code.

Delete the first sentence of clause 25 of the code and replace with:

25. *Chorus has complied with clause 10.1, if:*

