



Fibre de-regulation review: reasonable grounds  
assessment draft decision

Submission | Commerce Commission  
24 September 2024

## Submission

1. Thank you for the opportunity to provide feedback on the Commission's reasonable grounds assessment draft decision (**the draft**).
2. The Commission is required by section 210 of the Act to, before the start of each regulatory period, consider whether there are reasonable grounds to start a deregulation review of one or more FFLAS services. We support the Commission's draft decision as a pragmatic and reasonable consideration of whether there are grounds to start a deregulation review.
3. The Commission has only just put the Part 6 regime in place and - to immediately head into a deregulation review - can only increase risk and uncertainty for all parties. Further reviews and changes to regulations would be required where a deregulation review relates to an anchor service. In our view, the Commission should require a compelling case before starting a deregulation review.

### Competition assessment and reasonable grounds approach

4. In terms of the approach, the draft:
  - a. Identifies a range of FFLAS services<sup>1</sup> and considers whether there are any alternatives that could provide a direct or indirect (i.e., in downstream retail markets) competitive constraint to the extent that competition is constraining regulated providers substantial market power<sup>2</sup>, and
  - b. Then considers whether the information before the Commission is objectively sufficient to leave it with a view that deregulation is likely to promote the purpose in section 162 and, where relevant, workable competition under section 166(2)(b).
5. We agree that there are minimal competitive constraints across the range of identified FFLAS services. In practice, retail service providers must access Chorus and LFC UFB fibre services to offer the range of bandwidth and performance requirements that customers demand.
6. Further, service providers have few if any practical options for fibre transport services in UFB coverage areas. The multi-product nature of UFB fibre networks and shared costs mean that these conditions are unlikely to change over the medium term. Our view on the draft approach to voice services is discussed below.
7. As noted in the draft, we operate in a dynamic sector and there is some uncertainty relating to whether future services enabled by 5G technologies, for example, will provide an effective competitive constraint on FFLAS. However, the Commission is not required to solve for this uncertainty when considering whether reasonable grounds exist for a deregulation review. In our view, section 210 is a reminder that the Commission should periodically check whether a deregulation review is warranted, it is no more than that.
8. The legislative framework provides for the Commission to undertake a deregulation review at any time and this option is always available to the Commission. We consider that, at this stage in the regulatory cycle, there is no evidence to warrant deregulation. In our view, the costs of conducting a regulatory review would currently outweigh any benefits a review might deliver. The regulatory regime probably needs to be more firmly established to justify its review, as the

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<sup>1</sup> Voice services, Bitstream PON services, Point-to-point services, Unbundled PON services, Transport services, Co-location and interconnected services, and Connection services.

<sup>2</sup> A business with substantial market power can hold prices above competitive levels for a sustained period of time.

competition and market concerns it is designed to address have not shown any significant shifts since the implementation of the regime.

### There is group of customers for which there is discernible demand for a wired voice service

9. We agree that wireless and mobile voice services are reliable options that represent good value for money. Many end-users have already elected to relinquish their fixed line, and wireless and mobile providers now serve the bulk of voice customers, carrying around 90% of voice traffic.
10. Even if the Commission were to identify that mobile voice services are functionally equivalent to fixed voice for a majority of consumers, elasticities of demand for specific, and significant, groups of consumers that make switching to a wireless functional equivalent much more difficult. A “wired” voice service remains an important service for a group of customers, many of which are vulnerable customers.
11. We see consumer demand for fibre landline services in copper withdrawal migrations. Spark residual copper connection volumes in SFA areas tend to be weighted towards copper landline services and [ ]SPKCI While the Commission reports that the number of fibre voice anchor service connections remains low, we expect this number to increase as the copper network is retired.
12. There is a material group of customers who demand a wired service and are resistant to wireless landline options and, for these customers, Chorus and LFCs have the ability and incentive to hold prices above competitive levels for a sustained period. The Commission typically defines markets by reference to the products or locations for which these high prices can be sustained, which may be the case for this segment<sup>3</sup>.
13. Further, the Commission should – where current pricing and behaviours appear likely to be distorted – place additional scrutiny on wholesale provider behaviours and pricing. For example, regulated price caps were set some years ago and – while the availability and pricing of technology alternatives have improved markedly, and customers are rapidly relinquishing wired landlines – wholesale providers have continued to price to the regulated caps (increasing prices by the permitted CPI maximum). While we acknowledge regulated providers are responding to the many incentives they face, this behaviour on its own is one indicator that the relevant market may not yet be workably competitive.
14. Accordingly, it’s likely that current wholesaler landline behaviour, prices and outcomes reflects regulatory incentives and provider value optimisation across all services that use the network, rather than a beneficial competitive constraint. In other words, we do not know whether providers can extract excessive profits from the voice service<sup>4</sup> as we do not know what the efficient voice price is, all we know is that Chorus is not making excessive profits across all FFLAS revenues as defined by the regulatory cost model.
15. If the Commission were to consider voice deregulation further in future, recognising the multi-product and regulated nature of the providers, it should consider a counterfactual of what the might expect efficient prices to be in a competitive market.

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<sup>3</sup> Approach to identifying markets and market power from the Commission merger and acquisition guidelines from 3.18

<sup>4</sup> Contrary Commission view at 3.55 of the draft

## Navigating complexity by requiring competitive constraints across a broad range of FFLAS services

16. We also support the Commission taking a broader perspective to its section 162 and 166 considerations relating to whether deregulation is in consumer interests. The framework considerations could extend to whether, for example, voice deregulation which would inevitably require anchor service changes is also in consumer interests (given the purpose driving the regulation of regulating anchor services).
17. As set out in our earlier submission, in our view, the Commission should supplement its FFLAS-by-FFLAS competition analysis by “stepping back” and considering:
  - a. Chorus and LFC providers’ broader role in the sector as operators of the national fibre network, and a regulatory framework designed to curb Chorus’ ability and incentives to distort competition and end-user outcomes, and
  - b. That, in practice, the regulated fibre networks support multiple FFLAS services, and the regulatory framework affords providers significant flexibility to price to different customer groups.

This means that overly focusing on an individual service is likely to result in errors as, for example, the appearance of competition may be the outcome of provider pricing decisions, BBM investment and cost allocation decisions rather than reflecting consumer preferences and cost.
18. The tentative conclusions relating to voice services in the draft highlights the difficulties of assessing each FFLAS in isolation. The voice service is one of many services provided over the fibre network, there is differing consumer demands, and observed market outcomes are in part the product of wholesale provider pricing decisions.
19. The practicalities of fibre networks is that services are not provided or priced in isolation from each other, or the regulatory framework and therefore considering services in isolation is unlikely to expose competition and consumer issues and more likely to increase the risk of regulatory error. Recognising the shared nature of the network and interdependencies, the Commission should further consider whether deregulation of one FFLAS best promotes the purpose across all FFLAS services. In other words, consider whether a proposal promotes the purpose for the service in question (voice) and for the broader set of FFLAS which will be impacted by deregulation. For example, unbundled PON will likely be more complex and difficult to access where downstream services are a mix of regulated and deregulated FFLAS services.
20. As set out earlier, we believe a practical way to navigate this complexity for the purposes of a reasonable grounds review is to only consider undertaking a deregulation review where, as a pre-condition, competitive constraints are vividly observable across a range of FFLAS services today. We consider that the pre-condition does not currently exist.
21. Accordingly, while we agree with the draft decision, we believe the Commission could also have rightly observed that the lack of evidence of competitive constraints across a broad range of FFLAS services meant that a deregulation review is unlikely to be warranted.

**[end]**