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Chorus' proposal to vary its Deed of Open Access Undertaking for Copper Services to simplify updates to the Sharing Arrangements Transition Plan

Consultation paper

The Commission: Tristan Gilbertson
John Small
Elisabeth Welson

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Glossary

Act	Telecommunications Act 2001
Copper Deed	Chorus' Deed of Open Access Undertakings for Copper Services
De-merger	The separation of Telecom into two separate entities, Spark and Chorus
LFC	Local fibre company, one of the four companies (including Chorus) contracted to provide UFB services
Operational separation	The requirement for Chorus to be separated from Telecom operationally (eg different buildings, distinct staff etc) but still able to be owned by Telecom
SATP	Sharing Arrangements Transition Plan
Sharing arrangement	An arrangement, agreement, contract, or understanding between Spark and Chorus for the purpose of providing either or both with access to, or continued use of, a system, asset, or service that is owned or controlled by Telecom at the close of the day before separation day.
Spark	Spark or Telecom after separation
Structural separation	The pre-requisite for participation in the UFB project, requiring Spark and Chorus to be separately listed companies
UFB	Ultra-fast broadband

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Introduction

Purpose

1. Chorus has requested a variation to its Deed of Open Access Undertakings for Copper Services (**Copper Deed**)¹. The Copper Deed requires Chorus to maintain and update a Sharing Arrangements Transition Plan (**SATP**). The requested variation is to reduce the level of detail contained in the SATP.
2. The process for making variations to the Copper Deed is set out under section 156AL of the Telecommunications Act 2001 (**the Act**). In order to vary the Copper Deed, the Commerce Commission (**Commission**) must recommend that the Minister of Communications (**Minister**) approves the proposed variation.² However, before considering whether to make a recommendation in support of the requested variation, we must consult interested parties regarding the variation.³
3. The purpose of this Consultation Paper is to set out Chorus' proposed variation to the Copper Deed and our preliminary view on whether it aligns with the prescribed legislative purpose.
4. This Consultation Paper and your response to it will form the basis of whether we make a recommendation to the Minister.

Context

5. Following the structural separation of Telecom in 2011, sharing arrangements⁴ were put in place between Spark and Chorus to administer the continued use and sharing of systems (primarily copper-related) that were owned or controlled by Telecom prior its separation.
6. Following from this, Chorus was required to submit the Copper Deed, which replaced Telecom's 2008 Deed of Undertaking.
7. Under the Copper Deed, Chorus committed to develop and maintain a SATP. This identifies where sharing is on-going, alongside the actions and timeframes to conclude sharing, ultimately resulting in the cessation of the sharing arrangements.
8. Chorus is required to annually update the SATP and provide this to the Minister.

¹ The copper deed can be found at https://comcom.govt.nz/_data/assets/pdf_file/0026/90494/Chorus-Copper-Deed-6-October-2011.PDF.

² Section 156AL(1).

³ Section 156AL(2); the purpose of Subpart 4 of Part 2A is provided at s 69W of the Telco Act.

⁴ A sharing arrangement is defined in section 69C(1)(a) of the Telco Act as "an arrangement, agreement, contract, or understanding between Spark and Chorus for the purpose of providing either or both with access to, or continued use of, a system, asset, or service that is owned or controlled by Telecom at the close of the day before separation day." In practice they mainly relate to computer systems.

Our preliminary views support the requested variation

9. Our preliminary view is that Chorus' proposed variation meets the purpose of Subpart 4 of Part 2A of the Act, and that therefore the Commission should recommend to the Minister that the variation of the Copper Deed be approved.
10. The purpose Subpart 4 of Part 2A is provided in section 69W and states:

The purposes of this subpart are to—

- (a) promote competition in telecommunications markets for the long-term benefit of end-users of telecommunications services in New Zealand; and
- (b) require transparency, non-discrimination, and equivalence of supply in relation to certain telecommunications services; and
- (c) facilitate efficient investment in telecommunications infrastructure and services.

Providing your views

11. Please email your submission to (market.regulation@comcom.govt.nz) by 5pm on **11 October 2022**.
12. Please provide (if necessary) both a confidential and non-confidential version of your submission and clearly identify the confidential and non-confidential versions.
13. When including commercially sensitive or confidential information in your submission, we offer the following guidance:
 - 13.1 Please provide a clearly labelled confidential version and public version. We intend to publish all public versions on our website.
 - 13.2 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.
14. If we consider information disclosed 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.

Overview of next steps

15. Following consideration of submissions on the Consultation Paper, we will determine whether to recommend that the Minister approves the variation requested by Chorus. If a recommendation is determined, it will be provided to the Minister and published by 15 November 2022.

Shared Systems

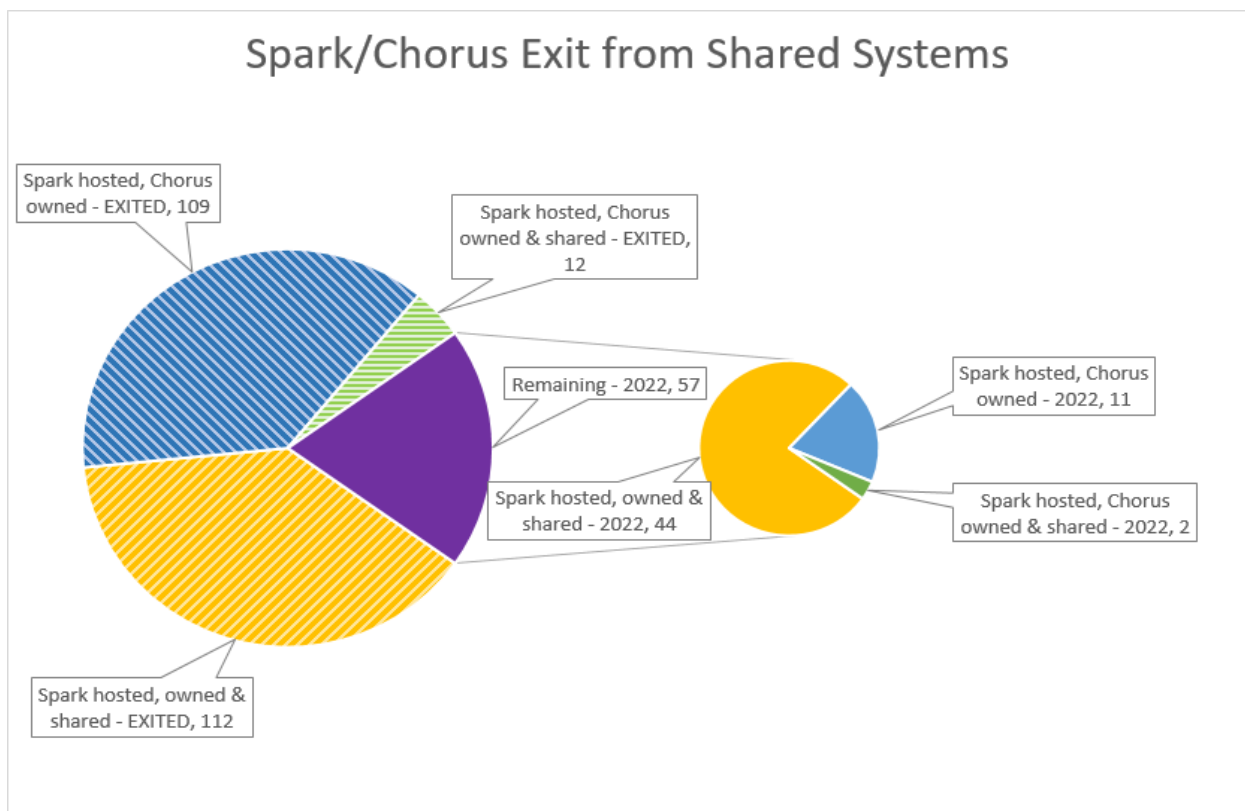
Types of shared systems

16. In the context of the sharing arrangements, systems can be 'shared' in more than one sense:
 - 16.1 They can be hosted by Spark, even though they are owned by Chorus and only used by Chorus; or
 - 16.2 It can also mean that it is a system used by Spark to manage both Spark and Chorus-owned systems. This is true for about a half of the remaining "Spark hosted, owned and shared" systems (right hand pie chart).

Progress in exiting from the shared systems

17. Chorus has provided us a breakdown of the number of Chorus systems hosted by Spark completely and ones that are shared between itself and Spark. They have also set out how many systems have been moved off the Spark platform, along with information regarding the remaining shared systems.

Figure 1: Shared Systems View 2022



Source: Chorus

18. As shown in Figure 1, of the 290 systems initially covered by the SATP, 233 (~80%) are no longer covered by the SATP, leaving 57 (~20%) still to be separated.

19. The remaining 57 systems are primarily required to manage copper services. Chorus expects that the last of these remaining systems will be retained until 2028.

Chorus' Requested Variation

20. In November 2019, Chorus proposed to the Minister that their annual obligations to update the SATP as prescribed in the Copper Deed be simplified. In December 2019, the Minister welcomed the proposal and directed Chorus to submit a request in writing to the Commission to enable amendment to the Copper Deed.
21. We received Chorus' request to vary the Copper Deed on 29 April 2022. They propose varying the wording in clause 17.2 to the following:

17.2 The Sharing Arrangements Transition Plan will identify key Sharing Arrangements and will set out:

- (a) key changes to sharing arrangements during the previous 12 months;
- (b) the current state of sharing arrangements, in terms of number of shared systems remaining; and
- (c) a forecast of future changes anticipated to move to ending the sharing arrangements without significant and unreasonable costs to Chorus.

Figure 2: A side-by-side comparison of the current wording of clause 17.2 and Chorus' proposed text

Clause	Existing text	Chorus' proposed text
17.2	The sharing arrangements Transition Plan will identify key sharing arrangements and will set out for each key sharing arrangement:	The Sharing Arrangements Transition Plan will identify key sharing arrangements and will set out:
(a)	a description of the actions required to move to ending the sharing arrangement without imposing significant and unreasonable costs on Chorus;	key changes to sharing arrangements during the previous 12 months;
(b)	time frames for the actions described in paragraph (a)	the current state of sharing arrangements, in terms of number of shared systems remaining; and
(c)	the trigger points and dependencies (commercial, technological or otherwise) for meeting the time frames described in paragraph (b); and	a forecast of future changes anticipated to move to ending the sharing arrangements without significant and unreasonable costs to Chorus.
(d)	the actions described in paragraph (a) that are currently underway and/or planned for the next 12 months, if any	deleted

Our preliminary views of Chorus' requested variation

22. As outlined above, the Minister may approve a variation to an undertaking on the recommendation of the Commission. However, the Commission must not recommend a variation to the Minister unless:
- 22.1 the LFC who gave the undertaking has requested it;
 - 22.2 the Commission has consulted interested parties; and
 - 22.3 the Commission is satisfied that the variation gives effect to the purpose of the subpart of the Act that sets out the variation process.
23. In this instance, Chorus has requested a variation to the Copper Deed in relation to its SATP; and for the purposes of consultation with interested parties, we are setting out our preliminary views on whether we are satisfied that the requested variation gives effect to section 69W of the Act, which states:

The purposes of this subpart are to—

- (a) promote competition in telecommunications markets for the long-term benefit of end-users of telecommunications services in New Zealand; and
- (b) require transparency, non-discrimination, and equivalence of supply in relation to certain telecommunications services; and
- (c) facilitate efficient investment in telecommunications infrastructure and services.

Does the proposed variation promote competition in telecommunications markets for the long-term benefit of end-users of telecommunications services in New Zealand?

24. Chorus' requested variation to simplify the SATP will not impact competition in telecommunications markets.

Does the proposed variation support transparency, non-discrimination, and equivalence of supply in relation to certain telecommunications services?

25. Currently, Chorus' annual SATP updates are complex, technical documents. Specialist knowledge is often required to interpret and understand them and their implications. It can be difficult for non-Chorus, non-technical readers to be sure that they have understood the implications of the contents of the document.
26. Chorus' requested variation will have the effect of simplifying the SATP, thereby improving transparency. On this basis, our preliminary view is that this satisfies section 69W of the Act.

Does the proposed variation facilitate efficient investment in telecommunications infrastructure and services?

27. Chorus' requested variation to simplify the SATP will not impact investment in telecommunications infrastructure and services.

Other considerations

28. In the event that this variation results in unintended negative consequences with respect to the sharing arrangements, the Commission can request more detailed information from Chorus on sharing arrangements that will no longer be included in the annual report.⁵

⁵ Section 69H of the Telco Act empowers the Commission to require Chorus to prepare and disclose information regarding the terms, execution, or performance of a sharing arrangement: any information relating to the sharing arrangement that the Commission considers necessary for the purpose of monitoring compliance with Subpart 2 of Part 2A of the Telco Act.

Appendix 1: Legal framework

1. Subpart 4 of Part 2A of the Telco Act contains the provisions which impose obligations on Chorus to give undertakings in relation to the structural separation of Telecom. These undertakings are set out in the Copper Deed. Clause 17 of the Copper Deed sets out Chorus' requirement to prepare a SATP;⁶ and update that plan annually, providing the Minister with a copy of the plan and the updates.⁷
2. Clause 17.2 of the Copper Deed sets out the requirements for the SATP as follows:
 - 17.2 The Sharing Arrangements Transition Plan will identify key sharing arrangements and will set out for each key sharing arrangement:
 - (a) a description of the actions required to move to ending the sharing arrangement without imposing significant and unreasonable costs on Chorus;
 - (b) time frames for the actions described in paragraph (a);
 - (c) the trigger points and dependencies (commercial, technological or otherwise) for meeting the time frames described in paragraph (b); and
 - (d) the actions described in paragraph (a) that are currently underway and/or planned for the next 12 months, if any.

Process for variation of undertakings

3. Section 69XE of the Telco Act provides that sections 156AL to 156AN apply to undertakings under Subpart 4 of Part 2A, with necessary modifications. Section 156AL of the Telco Act sets out the process for varying undertakings:

156AL Variation of undertaking

- (1) The Minister may, on the recommendation of the Commission, approve a variation of an undertaking.
- (2) The Commission must not make a recommendation under subsection (1) unless—
 - (a) the LFC who gave the undertaking has submitted a request for the variation to the Commission; and
 - (b) the Commission has consulted with interested parties; and
 - (c) the Commission is satisfied that the variation would best give effect to the purposes of this subpart.

4. The purpose Subpart 4 of Part 2A is provided in section 69W and states:

⁶ Refer Clause 17.1 of the Copper Deed.

⁷ Refer Clause 17.5 of the Copper Deed.

The purposes of this subpart are to—

- (a) promote competition in telecommunications markets for the long-term benefit of end-users of telecommunications services in New Zealand; and
- (b) require transparency, non-discrimination, and equivalence of supply in relation to certain telecommunications services; and
- (c) facilitate efficient investment in telecommunications infrastructure and services.