

Vector Fibre: Submission to the Commerce Commission on Chorus' incentive payments

Date: 14 October 2021

Introduction

1. Vector Fibre welcomes the opportunity to provide views on the additional information published by the Commerce Commission relating to incentive payments by Chorus.
2. We are an active participant in the Auckland fibre market, and often come up against Chorus as our main competitor. As a much smaller operator than Chorus, we are in a unique position to offer a perspective of being a competitor to Chorus in the fixed fibre market.
3. We are very concerned that measures proposed by Chorus not only contravene s 201 of the Telecommunications Act 2001 and the non-discrimination obligations which form a key part of the regulatory regime, but also – should they be permitted – have the effect of eroding the ability of other service providers to economically offer new services to market. This is of course inconsistent with the purpose set out in s 162 of the Act, and has a detrimental impact on competition, innovation and price levels in the telecommunications market. Small changes outlined in the papers may seem relatively trivial but when considered in their totality can represent a significant undermining of the benefits of competition. We therefore urge the Commission to be mindful of this broader perspective when considering these issues.
4. We are of the view that the Commission's position in the draft PQ decision on the treatment of incentive payments was correct, as those payments do not meet the appropriate definition of capex.
5. We set out our views on some of the key issues that the Commission addresses below. While we have sought to keep this submission brief, its brevity is not an indication of how important we consider these issues to be in the context of getting the regulatory settings correct – as outlined in s 162 – as we head into the new environment in January 2022.

Compliance Issues with s 201

6. The requirement for geographically consistent pricing as set out in s 201 and which applies to Chorus as part of the price-quality regulatory framework is of course a key constraint on Chorus' pricing behaviour. The Commission's Guidance paper usefully traverses some of the important areas of potential concern.

7. To take just one example, paragraph 34 notes that:

*"Parliament also intended to prevent Chorus from selectively dropping prices in particular areas to deter competition that might otherwise develop, in particular from competing technologies like fixed wireless access."*¹

8. This paragraph usefully describes one of our major concerns we have with Chorus' commercial practices which take place under the broad banner of incentives. We struggle to see how the incentives outlined in Chorus' response to the Commission's RFI can possibly comply with s 201, including compliance with the paragraph above from the guidance. Vector Fibre takes issue with the ability of Chorus to selectively interpret s 201 to offer incentives which clearly are designed to compete with our customers. We have no issue with competition on a level-playing field basis but have serious concerns when the competitor has received significant government funding and attempts to selectively manipulate the applicable regulatory settings to its own advantage with the intention of stifling competition.

9. To illustrate the above point, we outline below an excerpt from Chorus' response to the Commission's RFI. We query how this can comply with s 201 (or the non-discrimination obligation for that matter), not least as it has a stifling effect on our ability to bring innovative new services to market in the business segment.

Business ADVANTAGE is designed to support larger businesses to migrate or upgrade to faster business fibre plans: credits range from \$400 - \$700 (plus up

¹ Geographically consistent pricing: Guidance on our intended approach to s 201 of the Telecommunications Act 2001

to \$100 marketing bonus credit) Premium Business ADVANTAGE Premium Business ADVANTAGE is designed to support large businesses with complex connectivity requirements moving onto our premium business service, NGA Business Premium (Glass Variant): installation credit of \$1000 (or in some cases x2 monthly rental).²

10. Chorus makes claims in its RFI response to address potential concerns with its practices, such as the following:

“...Chorus has developed an internal assessment process for ensuring our FFLAS pricing is consistent with GCP.” and

“we are confident that our current and planned incentives do not raise any GCP concerns”.)³.

11. These broad statements do not give us any comfort at all, and we urge that they are not accepted at face value.

12. Chorus also seems to imply that its history of incentive programmes entitles it to continue such practices, despite the relevance of s 201 and the non-discrimination principles. It states in its RFI response:

“While our suite of RSP consumer offers for CY2022 is still under development and we are yet to consult with RSPs on those offers, our expectation is that Mix It Up and Hyperfibre Install will continue to run in CY2022. Our current suite of business incentives runs until 30 June 2022 and will likely be extended.⁴”

13. We recommend that the Commission adopts due caution when considering Chorus’ statements, including requests to continue its current behaviour.

² CHORUS RESPONSE TO RFI 024 – CUSTOMER INCENTIVE PAYMENTS

³ As above

⁴ As above

Compliance with non-discrimination obligations

14. As the Commission has comprehensively discussed, non-discrimination (and EOI) are key principles in the oversight of the new regulatory regime. We recognize and agree with the paramount role they play.

15. We have grave concerns however that Chorus will be in effect policing its own behaviour with respect to non-discrimination (and s 201 for that matter), with a consequent adverse impact on their intended purpose. We have seen this play out recently in Chorus' behaviour regarding layer 1 fibre (which we discuss further below). In brief, we are of the view that their unbundling offer does not meet the ND and EOI criteria, highlighting the risk of Chorus self-policing and its impact on competition (this matter is of course the subject of a separate investigation by the Commission, the outcome of which is due soon).

16. Chorus makes the statement:

“When assessing proposed incentive offers for compliance with our non-discrimination obligations we consider:

- *availability of the offer,*
- *the offer terms and ability of RSPs to take up the offer; and*
- *equal access to information about the offer.”⁵*

17. Again, Chorus' statements are very general but lack specifics and – given past behaviour – offer us no assurance that the non-discrimination principles will be met to the standards required by the Commission and in the interests of a healthy competitive industry.

⁵ CHORUS RESPONSE TO RFI 024 – CUSTOMER INCENTIVE PAYMENTS

Unbundled fibre issues

18. We note the Commission makes reference to the role of declared services – including unbundled fibre – in helping to achieve the purposes of Part 6 of the Act. In principle we agree with the statement, but query how unbundled fibre can play any role when we have seen no evidence at all of commercial services being offered by RSPs over unbundled fibre by Chorus. This is to be expected, as it is our firm view that Chorus has intentionally constructed its unbundled fibre offering (called PONFAS) to be commercially and operationally unappealing.
19. Chorus has also outlined in its response to the Commission’s RFI that one of its incentives is the “Intact ONT”, which, “encourages RSPs to drive fibre connections by paying credits where an RSP converts any address on a specified list of off-net intact Chorus ONTs.⁶” Under the current PONFAS product construct, an unbundler would consume the second fibre which Chorus has installed into each premises, while in **every** unbundled situation (should they eventuate) Chorus will **maintain an intact ONT**. Therefore, it plans to offer incentives to RSPs to win back a layer 2 service from an unbundler. Following the Commission’s guidelines on non-discrimination, this seems to be an affront to the ND principles.
20. What’s more, Chorus currently provides a list of business addresses (including intact ONT details) on its service provider portal (see “Business off-net list⁷”) updated monthly, for the purposes of encouraging RSPs to sell them a Chorus layer 2 service. In the Auckland region, many (if not most) of these businesses are supplied with Vector Fibre (through our RSPs customers). Again, we query how this can be compliant with the non-discrimination principles.

⁶ CHORUS RESPONSE TO RFI 024 – CUSTOMER INCENTIVE PAYMENTS

⁷ <https://sp.chorus.co.nz/report/business-net-list>

Do incentive payments meet capex definition?

21. The Commission has sought views on whether and costs Chorus may incur in making incentive payments to obtain contracts with RSPs meet the definition of "capex" as defined in the fibre input methodologies.

22. The Commission discusses this issue at length in its *Chorus' price-quality path from 1 January 2022 – Draft decision Reasons paper*, (updated version 16 June 2021). We concur with the conclusion it reaches in the paper.

23. In our view, the key point which it touches on is the question of incentive payments – and in particular the **level** of incentive payments – can be used in an anticompetitive way, as below:

G36 ... However, the level of the payments, if excessive, can be anticompetitive. Chorus may have an incentive to excessively use these payments in an anticompetitive way. The extent to which it has the ability to do so is influenced by our regulation⁸.

24. As a fibre market participant whose major competitor is Chorus, Vector Fibre is well placed to comment about the impact of Chorus' behaviour in the market. As noted above, the decisions that it has made with respect to unbundled fibre has had a dramatic impact on our ability to compete. As we address below, Chorus' customers' letters describe the importance to them of incentives to acquire customers, which underpins the above point that excessive payments can be uncompetitive. And it aligns with our own experience; in short it is very difficult to compete against Chorus' incentive payments and offers; we simply cannot match its level of incentives. We are happy to compete in a genuinely open, competitive market, however, the market for fibre access services does not meet that description in our view.

⁸ Chorus' price-quality path from 1 January 2022 – Draft decision Reasons paper

Other stakeholder views

25. We acknowledge the views of the four other parties that wrote to the Commission expressing their views of Chorus' incentive programme. Their views are understandable in the context of operating in a competitive market with low margins, seeking financial support where they can for their promotional activities in order to gain an edge.
26. However, we would like to point out they are not – in our view – addressing the concerns through the appropriate lenses – those of compliance with s 201 and non-discrimination obligations – and therefore should be treated accordingly. And as noted, they could in fact be evidence of excessive use of incentives.

Conclusion

27. Vector Fibre supports the Commission's efforts to ensure it is considering all the key issues with respect to the use of incentive payments, especially regarding compliance with s 201 of the Act and the non-discrimination obligations.
28. We would like to emphasise the importance of ensuring these issues are accorded appropriate weight, as it is important that Chorus faces appropriate regulatory constraints, particularly where competitive pressures are insignificant.
29. We offer our views from the perspective of a fibre provider providing services to the market and investing in new innovative solutions for customers, for which an even-handed regulatory regime is crucial. The risks to competition of excessive Chorus behaviour are very real; we have current, first-hand experience of Chorus attempting to write the rules with its unbundled fibre offer, and the result is zero uptake, with the consequent reduction in competition in the fixed fibre access market.