

2019 Final report on whether Spark's Resale Services should be omitted from Schedule 1 of the Telecommunications Act 2001

Final report to the Minister of Broadcasting, Communications and Digital Media.

The Commission: Dr Stephen Gale

 Elisabeth Welson

 John Crawford

 Dr Jill Walker

Date of publication: 18 July 2019



Associated documents

Publication date	Reference	Title
17 April 2019	ISBN 978-1-869456-90-0	2019 Draft report on whether Spark's Resale Services should be omitted from Schedule 1 of the Telecommunications Act 2001
22 December 2016	ISBN 978-1-869455-55-2	Final report on whether Spark's Resale Services should be omitted from Schedule 1 of the Telecommunications Act 2001
23 September 2016	ISBN 978-1-869455-37-8	Draft report on whether Spark's Resale Voice Services should be omitted from Schedule 1 of the Telecommunications Act 2001
5 July 2016	ISSN 1178-2560	Final decision on the review of Schedule 1 services
29 April 2016	ISSN 1178-2560	Review of Designated and Specified Services under Schedule 1 of the Telecommunications Act 2001

Commerce Commission

Wellington, New Zealand

Glossary

Access provider	The provider of a regulated service.
Access seeker	The purchaser of a regulated service.
Act	Telecommunications Act 2001
Baseband services	Commercial services supplied by Chorus Limited (Chorus) that allow the delivery of voice services to end-users. ¹
Chorus	Chorus Limited
Designated service	Services regulated on a price basis under the Telecommunications Act (see also specified services).
End-user	A telecommunications service end-user is a person (or business) who is the ultimate recipient of a telecommunications service (eg, the person using a broadband internet connection) or a service that relies on a telecommunications service (eg, the user of a monitored health alarm).
FWA	Fixed Wireless Access.
IP	Internet Protocol.
ISDN	Integrated Services Digital Network.
MBIE	Ministry of Business, Innovation and Employment.
PSTN	Public Switched Telephone Network, as defined in section 5 of the Act.
Resale Services	Wholesale voice services provided by Spark over the copper network and described in Schedule 1 of the Act as - local access and calling services offered by means of a fixed telecommunications network (local access and calling service) (eg, telephone service), retail services offered by means of a fixed telecommunications network

¹ The different variants of Baseband services, such as Baseband Copper, Baseband IP and Baseband IP Extended, and their relationship with Chorus' Unbundled Copper Low Frequency (UCLF) are detailed in Attachment A of the 2016 Draft report on whether Spark New Zealand Limited's Resale Voice Services should be omitted from Schedule 1 of the Act. Commerce Commission "Draft report on whether Spark's Resale Voice Services should be omitted from Schedule 1 of the Telecommunications Act 2001" (23 September 2016), Attachment A.

(Retail Services) (eg, call transfer, call waiting etc), retail services offered by means of a fixed telecommunications network as part of a bundle (eg, retail services bundled with broadband services).

RBI	Rural Broadband Initiative, an initiative where the government partners with private sector telecommunications operators to upgrade or extend telecommunications networks outside UFB areas.
RSP	Retail Service Provider. RSPs provide telecommunication services to end-users.
Spark	Spark New Zealand Limited
Specified service	A service described in Part 3 of Schedule 1 of the Act. Specified services are services where only non-price terms are regulated under the Act. For example, access providers are required to offer a national roaming service but are free to set prices commercially (see also designated services).
STD	Standard Terms Determinations - one of the Commission's mechanisms for regulating designated services and specified services under the Act.
TSO	Telecommunications Service Obligation - a regulatory framework established under the Act enabling specific telecommunications services to be available and affordable. Spark (supported by Chorus) is the TSO provider for the local residential telephone service, which includes charge-free local calling.
UCLF	Unbundled Copper Low Frequency service is a wholesale service provided by Chorus that enables access to, and interconnection with, the low frequency band (300 to 3400Hz) of the copper line and can be accessed by retail telecommunications providers to provide voice services. The UCLF service is available from an exchange including on cabinetised lines.
UFB	The New Zealand government's Ultra-Fast Broadband initiative.
VoIP	Voice over Internet Protocol is a way to send voice calls over a data connection such as a broadband connection.

Table of Contents

Chapter 1	Introduction and summary	6
	Purpose of this paper	6
	Our recommendation	6
	Structure of this report	7
	What are Resale Services?	7
	The process we have followed	8
	Next steps	10
	Summary of reasons for our recommendation	10
	Summary of submissions received on our 2019 draft report	11
Chapter 2	Our decision-making framework	14
	Purpose of this chapter	14
	Our required legal process	14
	Our decision must best give effect to the purpose in section 18	16
	Our process for assessing whether regulation is required to best give effect to section 18	18
Chapter 3	Our recommendation to the Minister	19
	Purpose of this chapter	19
	Our recommendation	19
Attachment A	Overview of the regulation of Resale Services	30
Attachment B	Our process	32

Chapter 1 Introduction and summary

Purpose of this paper

- 1.1 This final report follows on from our draft report, published in April 2019, on whether three resale voice services (Resale Services)² supplied by Spark New Zealand Limited (Spark) should be omitted from Schedule 1 of the Telecommunications Act 2001 (Act).³ As required by clause 7(2)(c) of Schedule 3 of the Act, this final report contains the matters set out in the draft report and summarises, and makes recommendations on, the submissions received on that draft report.
- 1.2 The 2019 draft and final reports are issued following our consideration in 2016 of whether to omit the Resale Services from Schedule 1 of the Act, and the resulting acceptance by the then Minister of Communications of our recommendation to defer that decision for two years.

Our recommendation

- 1.3 In this final report, we recommend that the Minister omit the Resale Services from Schedule 1 of the Act with immediate effect.
- 1.4 In making our recommendation, we have given consideration to the three Resale Services together, and consider them to be sufficiently related to each other that they ought to be considered together by the Minister for the purposes of clause 4(4) of Schedule 3 of the Act.

² See the Glossary and para 1.6 for a full description of the Resale Services

³ [Commerce Commission "2019 Draft report on whether Spark's Resale Services should be omitted from Schedule 1 of the Telecommunications Act 2001"](#) (17 April 2019).

Structure of this report

- 1.5 This report comprises the following sections:
 - 1.5.1 an explanation of what Resale Services are, why we conducted this investigation, and our recommendations to the Minister. It also includes a summary of submissions received on our 2019 draft report (Chapter 1);
 - 1.5.2 our decision-making framework (Chapter 2);
 - 1.5.3 our analysis supporting the recommendations (Chapter 3);
 - 1.5.4 an overview of the current regulation of Resale Services (Attachment A); and
 - 1.5.5 our process (Attachment B).

What are Resale Services?

- 1.6 The three Resale Services in Schedule 1 of the Act are:
 - 1.6.1 local access and calling services offered by means of a fixed telecommunications network (local access and calling service) (eg, telephone service);
 - 1.6.2 retail services offered by means of a fixed telecommunications network (Retail Services) (eg, call transfer, call waiting etc or fax); and
 - 1.6.3 retail services offered by means of a fixed telecommunications network as part of a bundle (eg, part of a bundle of the above).
- 1.7 The Resale Services provide retail service providers (RSPs) with the ability to rebrand and on-sell copper-based voice services to end-users. These services can be a stand-alone voice service, additional 'retail' features like voice mail or a separate connection for Eftpos, or a bundle of these services.
- 1.8 The regulation of Resale Services opened up access to New Zealand's incumbent Public Switched Telephone Network (PSTN) (previously operated by Telecom Corporation of New Zealand Limited, and now Spark). Access to the platform allowed RSPs to enter and supply end-users with voice services without having to invest in their own network infrastructure.

- 1.9 RSPs currently buy Spark's wholesale voice services by commercial agreement, but the inclusion of Resale Services in Schedule 1 of the Act provides a regulatory backstop. This backstop means we could compel Spark to supply these services at a margin less than its own retail price if commercial arrangements were to fail in a way that threatened competition.⁴

The process we have followed

- 1.10 This final report follows on from our 2016 draft and final reports, and our 2019 draft report.
- 1.11 In 2016, we completed an investigation into whether the Resale Services should be omitted from Schedule 1 of the Act pursuant to Part 1 of Schedule 3 of the Act. At the time, we recommended that the then Minister for Communications:⁵
- "does not omit Resale Services from Schedule 1 of the Act at this time; and defers the decision for two years from the date of this report."
- 1.12 In March 2017, the then Minister for Communications accepted our recommendation to defer the decision for two years from the date of our report and referred our recommendation back to us for a report at the end of this two-year period pursuant to clause 7 of Schedule 3 of the Act.⁶
- 1.13 In April 2017, we confirmed that we would prepare a draft report in early 2019, in accordance with the process set out in clause 7 of Schedule 3 of the Act.⁷ The two years have now passed, and we have re-examined whether it is necessary to make any amendments to our 2016 final report recommendations.⁸

⁴ For example, we could make a STD specifying the terms on which the Resale Services must be supplied to all access seekers and all access providers under Subpart 2A of the Telecommunications Act 2001.

⁵ We note the Minister for Communications is now known as the Minister of Broadcasting, Communications and Digital Media. Commerce Commission "Final report on whether Spark's Resale Services should be omitted from Schedule 1 of the Telecommunications Act 2001" (22 December 2016), para X2.

⁶ Hon Simon Bridges, Minister for Communications ["My decision on your recommendations about Spark's Resale Voice Services"](#) (27 March 2017).

⁷ Dr Stephen Gale, Telecommunications Commissioner ["Re: Spark's resale Voice Services - Next steps"](#) (27 April 2017). A high-level overview of our review process to date is provided in Attachment B.

⁸ Our review has been conducted under clause 1(3) of Schedule 3 of the Act.

- 1.14 On 17 April 2019, we published a draft report setting out the amendments we wished to make to the recommendation and inviting submissions. Public notice of the publication of the draft report, our draft recommendations, and the date for submissions was also given in the *Gazette* on 17 April 2019.⁹
- 1.15 Our draft report recommended that the Resale Services be omitted from Schedule 1 of the Act.¹⁰
- 1.16 Our draft report also provided a draft view that any consideration by the Minister of whether to omit the Resale Services from Schedule 1 of the Act ought to consider the Resale Services together, on the basis that these services are 'sufficiently related to each other'.¹¹
- 1.17 On 17 May 2019, we received two submissions on our draft report from Chorus and Spark.¹² Both submitters agreed with our proposal to deregulate the Resale Services (and therefore to omit the Resale Services from Schedule 1 of the Act).¹³
- 1.18 This final report to the Minister contains the matters set out in our draft report and summarises, and makes recommendations on, the submissions received on our draft report.¹⁴

⁹ We are required to give public notice of our draft report release under clause 7 of Schedule 3 of the Act.

¹⁰ [Commerce Commission "2019 Draft report on whether Spark's Resale Services should be omitted from Schedule 1 of the Telecommunications Act 2001"](#) (17 April 2019), para 1.9.

¹¹ [Commerce Commission "2019 Draft report on whether Spark's Resale Services should be omitted from Schedule 1 of the Telecommunications Act 2001"](#) (17 April 2019), para 1.9. Under clause 4(4) of Schedule 3 of the Act, we may, if we think fit, identify any recommendations included in the final report that we consider to be sufficiently related to each other that they ought to be considered together by the Minister.

¹² These are available on our website. Commerce Commission "[Investigation into Spark's resale voice services](#)".

¹³ Chorus "Submission on the Draft Report on Spark's Resale Services" (17 May 2019) para 2. Spark "Spark submission on 2019 Draft report on whether Spark's Resale Services should be omitted from Schedule 1 of the Act" (17 May 2019) para 2.

¹⁴ As required under clause 7(2)(c) of Schedule 3 of the Act.

Next steps

- 1.19 In considering this final report, the Act requires the Minister to:¹⁵
- 1.19.1 consider together any recommendations that the Commission has identified in its Final report to be sufficiently related to each other (a set of related recommendations); and
 - 1.19.2 consider separately any other recommendations.
- 1.20 The Minister may:
- 1.20.1 accept or reject our recommendations;¹⁶ or
 - 1.20.2 require us to reconsider, for any reasons specified by the Minister, our recommendations.¹⁷
- 1.21 If the Minister accepts the recommendation in this final report, he would then recommend that the Governor-General, by Order in Council, omits Resale Services from Schedule 1 of the Act.¹⁸

Summary of reasons for our recommendation

- 1.22 We conclude that the inclusion of Resale Services in Schedule 1 of the Act, which currently acts as a form of backstop regulation, is not required to help promote competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand. We reach this conclusion on the basis that competition in relevant markets is established, increasingly effective, and no longer dependent on RSPs having regulated access to the Resale Services.
- 1.23 Chorus, the local fibre companies, and fixed wireless operators all have the infrastructure to offer alternative wholesale voice services to RSPs.

¹⁵ In accordance with clause 6(1) of Schedule 3 of the Act.

¹⁶ Clause 6(2)(a)(i) of Schedule 3 of the Act.

¹⁷ Clause 6(2)(b)(i) of Schedule 3 of the Act.

¹⁸ Sections 66(b) and 68 of the Act.

- 1.24 Alternative services (such as voice over fibre) are readily available to most end-users, and those few remaining end-users that have no option other than to receive voice services from Spark are protected by the Telecommunications Service Obligations (TSO) requirements.¹⁹ Furthermore, being foreclosed from supplying this small group of consumers does not affect the ability of RSPs to compete in telecommunications markets for the long-term benefit of consumers more broadly.
- 1.25 We consider removing unnecessary regulation is good for investor confidence and best gives effect to the purpose of Schedule 1, as set out in section 18 of the Act. In short, having the Resale Services in Schedule 1 of the Act is not in itself delivering competitive retail pricing or innovation in voice services.
- 1.26 Overall, we consider that even if the benefits of deregulating the Resale Services are small, deregulation, through omitting the Resale Services from Schedule 1 of the Act, will best give effect to the purpose in section 18 of the Act.²⁰

Summary of submissions received on our 2019 draft report

- 1.27 We received two submissions on our 2019 draft report, from Spark and Chorus.²¹ Both submitters agreed with our proposal to deregulate the Resale Services.²²
- 1.28 Spark noted:²³

We consider that there are both direct and indirect costs of maintaining unnecessary regulation and support the Commission's view that this in case the indirect costs alone justify removable of regulatory powers that are no longer required. The Commission rightly recognises that removing regulation and lifting regulatory powers is likely to give best effect to section 18 and to send efficient signals and incentives to market participants and investors...

¹⁹ [Telecommunications Service Obligations \(TSO\) Deed for local residential telephone service](https://comcom.govt.nz/regulated-industries/telecommunications/industry-levy-and-service-obligations/telecommunication-deeds) (November 2011). Available on our website at Commerce Commission "Telecommunication deeds" at <https://comcom.govt.nz/regulated-industries/telecommunications/industry-levy-and-service-obligations/telecommunication-deeds>.

²⁰ These reasons are explained more in Chapter 3.

²¹ These are available on our website. Commerce Commission "[Investigation into Spark's resale voice services](#)".

²² Chorus "Submission on the Draft Report on Spark's Resale Services" (17 May 2019) para 2. Spark "Spark submission on 2019 Draft report on whether Spark's Resale Services should be omitted from Schedule 1 of the Act" (17 May 2019) para 2.

²³ Spark "Spark submission on 2019 Draft report on whether Spark's Resale Services should be omitted from Schedule 1 of the Act" (17 May 2019) para 7 and 9.

Continued backstop regulation would not be a proportionate remedy under these circumstances as it could distort service and investment decisions, delay the availability of additional choices for end-users, and provide ongoing displacement of efficient investment.

1.29 Chorus also noted:²⁴

Given the Commission's proposal to omit Spark's three resale voice services from the Act, effectively deregulating the local access and calling service, we propose the Commission also engages with policy-makers to support the removal of our obligation to provide the bundle of UBA with Spark's local access and calling service. In our view it makes little sense to require Chorus to resell the service if the Commission has found that the service is no longer required to promote competition – as competition is established.

In the absence of that removal, Spark will need to continue to supply the local access and calling service so that we can meet our statutory obligations. Currently this service is provided for under commercial terms between Chorus and Spark.

1.30 Chorus is correct to note that:

1.30.1 Section 69XA of the Act refers to Spark's "local access and calling service" as a defined term by reference to that designated access service in Schedule 1 of the Act (which is one of the three Resale Services); and

1.30.2 Section 69XB(i) of the Act requires the deed of open access undertaking given by Chorus in respect of its copper services to include an obligation to "supply the UBA service in a bundle with the local access and calling service".

1.31 Clause 7.1(b) of Chorus' deed of open access undertakings for copper services gives effect to the obligation in section 69XB(i) of the Act (although there are also other references to the local access and calling service within the deed).²⁵

1.32 Our view is that if the recommendation in this final report were to be accepted by the Minister, then the obligation on Chorus in section 69XB(i) (and the accompanying definition in section 69XA) would become redundant and cease to have effect, since there would no longer be a designated access service in Schedule 1 of the Act comprising a local access and calling service.

²⁴ Chorus "Submission on the Draft Report on Spark's Resale Services" (17 May 2019) para 4-5.

²⁵ A copy of the deed is available at <https://www.mbie.govt.nz/assets/7874c22a38/chorus-copper-deed.pdf>

- 1.33 In time, we would expect that this redundant text in the Act would be repealed through subsequent amending legislation, although the power to make such legislation is in the hands of the Ministry of Business, Innovation and Employment (MBIE) and Parliament, rather than the Commission.
- 1.34 However, the Act does provide for processes by which Chorus' deed of open access undertakings for copper services could be varied or clarified; for example, to remove the redundant references to the local access and calling service. The power to instigate those processes rests with Chorus, through written request or application to the Commission under section 156AM (variation) or 156AN (clarification).

Chapter 2 Our decision-making framework

Purpose of this chapter

- 2.1 This chapter provides our framework for this final report, including:
 - 2.1.1 our required legal process (what we need to consider);
 - 2.1.2 our decision must best give effect to the purpose in section 18 of the Act; and
 - 2.1.3 our process for assessing whether regulation of Resale Services is required to best give effect to the purpose in section 18 of the Act.

Our required legal process

- 2.2 This final report is issued under clause 7 of Schedule 3 of the Act.²⁶ Clause 7 of Schedule 3 of the Act sets out the process for us to make further recommendations to the Minister, where the Minister has deferred a decision on recommendations we have made in an earlier final report.
- 2.3 Clause 7 of Schedule 3 of the Act provides as follows:
 - (1) If the Minister accepts the Commission's recommendation that the Minister's decision be deferred for any period that the Commission thinks fit,—
 - (a) the Minister must refer the recommendation back to the Commission for a report after the end of the period on whether the recommendation should be amended; and
 - (b) the Commission must, after the end of that period,—
 - (i) prepare a draft report stating that the period has expired and setting out any amendments it wishes to make to the recommendation;²⁷

²⁶ In accordance with clause 7(2)(c) of Schedule 3 of the Act.

²⁷ As recommended by us - see Commerce Commission "Final report on whether Spark's Resale Services should be omitted from Schedule 1 of the Telecommunications Act 2001" (22 December 2016), para X2.2 and accepted by the Minister for Communications - see Hon Simon Bridges, Minister for Communications "My decision on your recommendations about Spark's Resale Voice Services" (27 March 2017).

- (2) If subclause (1)(b)(i) applies, the Commission must also—
- (a) give public notice of the draft report; and
 - (b) include in the public notice the closing date for submissions, which must not be later than 20 working days after the date of giving public notice; and
 - (c) prepare, as soon as is reasonably practicable after the closing date for submissions, a final report to the Minister that contains the matters set out in the draft report and summarises, and makes recommendations on, the submissions received on the draft report.²⁸

2.4 As required under clause 7(2)(c) of Schedule 3 of the Act, this final report to the Minister contains the matters set out in the draft report and summarises, and makes recommendations on, the submissions received on it.

2.5 Our draft report contained:

2.5.1 our draft view that we should recommend to the Minister that "the three Resale Services are omitted from Schedule 1 forthwith";²⁹ and

2.5.2 our draft view that we should recommend that "any consideration by the Minister of whether to omit the three Resale Services from Schedule 1 of the Act ought to consider the Resale Services together on the basis that these services are 'sufficiently related to each other'".³⁰

2.6 The recommendation in this final report deals with the three Resale Services together, given our view that these services are 'sufficiently related to each other' for the purposes of clause 4(4) of Schedule 3 of the Act, and should therefore also be considered by the Minister together.³¹

²⁸ Clause 7(2)(c) of Schedule 3 of the Act.

²⁹ [Commerce Commission "2019 Draft report on whether Spark's Resale Services should be omitted from Schedule 1 of the Telecommunications Act 2001"](#) (17 April 2019), para 1.9.

³⁰ [Commerce Commission "2019 Draft report on whether Spark's Resale Services should be omitted from Schedule 1 of the Telecommunications Act 2001"](#) (17 April 2019), para 1.9. Under clause 4(4) of Schedule 3 of the Act, we may, if we think fit, identify any recommendations included in the final report that we consider to be sufficiently related to each other that they ought to be considered together by the Minister.

³¹ Clause 6(1)(a) of Schedule 3 of the Act.

- 2.7 Upon receiving our recommendation, the Minister may:
- 2.7.1 accept or reject our recommendation;³² or
 - 2.7.2 require us to reconsider, for any reasons specified by the Minister, our recommendation.³³
- 2.8 If the Minister accepts our recommendation, he would then recommend that the Governor-General, by Order in Council, omits Resale Services from Schedule 1 of the Act.³⁴

Our decision must best give effect to the purpose in section 18

- 2.9 When undertaking a review under Schedule 3 of the Act, we are required to make recommendations that promote competition in telecommunication markets for the long-term benefit of end-users. That is, in considering whether our recommendations from our 2016 final report should be amended, we must make a decision that best gives effect to the purpose set out in section 18 of the Act.³⁵
- 2.10 Section 18 sets out the purpose of Part 2 and Schedules 1-3 of the Act, which is:

... to promote competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand by regulating, and providing for the regulation of, the supply of certain telecommunications services between service providers.

³² Clause 6(2)(a)(i) of Schedule 3 of the Act.

³³ Clause 6(2)(b)(i) of Schedule 3 of the Act.

³⁴ Section 66(b) and 68 of the Act.

³⁵ Section 19 of the Act.

2.11 We are required to consider the following when determining what promotes competition in telecommunications markets for the long-term benefit of end-users:³⁶

(2) In determining whether or not, or the extent to which, any act or omission will result, or will be likely to result, in competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand, the efficiencies that will result, or will be likely to result, from that act or omission must be considered.

(2A) To avoid doubt, in determining whether or not, or the extent to which, competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand is promoted, consideration must be given to the incentives to innovate that exist for, and the risks faced by, investors in new telecommunications services that involve significant capital investment and that offer capabilities not available from established services.

Applying section 18 to our recommendations

2.12 We consider that we must apply the purpose in section 18 of the Act to our consideration of amendments to our recommendations from our 2016 final report. Telecommunications services should only be regulated where regulation will give best effect to the promotion of competition for the long-term benefit of end-users of those services.

2.13 The Resale Services cannot be supplied in isolation from the access line. The “retail services offered by means of a fixed telecommunications network as part of a bundle” are also likely to be linked to the local access and calling service. Therefore, we have applied section 18 of the Act to the three Resale Services in conjunction.

2.14 We consider that the Resale Services should be omitted from Schedule 1 of the Act if competition is sufficiently effective and the benefits of regulation are outweighed by the direct and indirect costs of regulation. If competition is not yet sufficiently effective and the benefits of retaining the services are likely to outweigh the costs of retaining the services, we consider the Resale Services should be retained in Schedule 1 of the Act.

³⁶ In accordance with s 18(2) and s 18(2A) of the Act. As the High Court has observed in *Chorus Ltd v Commerce Commission* [2014] NZHC 690, s 18(1) is the “dominant” provision in s 18 of the Act, and subsections (2) and (2A) “are specified to assist our analysis under section 18(1)”. In this sense, subsections (2) and (2A) are not isolated considerations on their own. Rather, they form part of the consideration of whether competition is promoted for the long-term benefit of end-users. For a more detailed discussion, see Commerce Commission, Determination for Chorus' unbundled copper local loop service [2015] NZCC 37 at paragraphs 148–155.

Our process for assessing whether regulation is required to best give effect to section 18

- 2.15 In assessing whether regulation under Schedule 1 of the Act is required to best give effect to the purpose in section 18 of the Act, we looked at the following:
- 2.15.1 We examined the level of reliance RSPs had on the Resale Services through the change in volumes of the various services since 2016. That is, whether alternatives to Resale Services were readily available, enabling us to assess effective constraints.
 - 2.15.2 We focused on the ability of RSPs to self-supply the wholesale input and/or to source supply of the wholesale input independently of the Resale Services. In doing so, we considered the availability of wholesale alternatives across New Zealand.
 - 2.15.3 We assessed the likely benefits of omitting the Resale Services. We did this by looking at the potential costs that could be avoided if these services were omitted from Schedule 1 of the Act.

Chapter 3 Our recommendation to the Minister

Purpose of this chapter

- 3.1 This chapter sets out:
- 3.1.1 our recommendation to omit the Resale Services from Schedule 1 of the Act following our latest analysis and consultation;
 - 3.1.2 a brief overview of our 2016 final report reasoning as to the sufficiency of alternative services; and
 - 3.1.3 an overview of our analysis in 2016 on the three main reasons why we recommended not omitting Resale Services from Schedule 1 of the Act at that time, and why our views have now changed.

Our recommendation

- 3.2 In this final report, we recommend that the Minister omit Resale Services from Schedule 1 of the Act with immediate effect.
- 3.3 In making our recommendation, we have given consideration to the three Resale Services, set out in more detail in Schedule 1 of the Act, and consider them to be sufficiently related to each other that they ought to be considered together by the Minister for the purposes of clause 4(4) of Schedule 3 of the Act.

Reasoning

- 3.4 Since 2016, the number of resold lines has significantly decreased.³⁷ In 2016 the total number of resold Spark phone lines was 341,000. Our latest monitoring report records a total of 179,000 lines, a decrease of 48%.³⁸ This decrease suggests that RSPs likely have alternatives to Resale Services that they can migrate customers onto in a timely manner.

³⁷ A resold line is a telephone line, so it is a copper line bundled with a connection to a telephone exchange, providing plain ordinary telephone service functionality (including a telephone number and the ability to make and receive telephone calls). All three Resale Services are provided over resold lines.

³⁸ Commerce Commission "Annual Telecommunications Monitoring Report - 2018 Key facts" (18 December 2018) p4.

- 3.5 We received anecdotal support for a switch to alternative wholesale services from some RSPs who chose not to make formal submissions. They told us that Resale Services were no longer their focus, as they either had migrated, or were in the process of migrating, their end-users to alternatives – in particular Ultra-Fast Broadband (UFB) fibre services.
- 3.6 Our 2016 final report provided a signal that we were anticipating that Resale Services could be omitted from Schedule 1 of the Act, when sufficient alternative services became available.
- 3.7 We consider that alternative voice services to Spark's Resale Services include:
- 3.7.1 Baseband IP provided over Chorus' copper network;
 - 3.7.2 fixed wireless access (through Spark and the rural broadband initiative (RBI)); and
 - 3.7.3 VoIP services provided over a broadband connection (eg, fibre).
- 3.8 As sufficient alternative services have become available, we consider that omitting Resale Services from Schedule 1 of the Act can take place without the need for a further transition period.
- 3.9 We consider it would only be appropriate to keep Resale Services in Schedule 1 of the Act if we believed that we may need to regulate in the future, such as by compelling Spark to supply these services at a margin less than its own retail price.³⁹
- 3.10 There is increasing availability of alternative telecommunications technologies that can provide voice services, eg, Baseband IP using the copper network as well as via the fibre network. This situation has resulted in a decrease in the use of the PSTN to provide Resale Services and means that we consider a requirement for future regulation is unlikely.
- 3.11 We consider that the direct costs of regulation are small but there may be other indirect costs associated with continuing to apply regulation when it is no longer necessary.

³⁹ For example, we could make a STD specifying the terms on which the Resale Services must be supplied to all access seekers and all access providers under Subpart 2A of the Telecommunications Act 2001.

3.12 We received two submissions on our 2019 draft report from Spark and Chorus that supported our proposed recommendation.⁴⁰ Both submitters agreed with our proposal to deregulate the Resale Services.⁴¹ Chorus noted that:⁴²

legacy regulation should be removed when it is no longer required to serve a purpose.

3.13 In accordance with our required legal process, we have outlined below the matters set out in our 2019 draft report. We also make recommendations on these matters, having had regard to submissions received on our 2019 draft report, and having summarised submissions received on that report.

3.14 This final report makes recommendations on the following matters expressed in our 2019 draft report:

3.14.1 that we will recommend to the Minister that "the three Resale Services are omitted from Schedule 1 forthwith";⁴³ and

3.14.2 that we will recommend that "any consideration by the Minister of whether to omit the three Resale Services from Schedule 1 of the Act ought to consider the Resale Services together on the basis that these services are 'sufficiently related to each other'.⁴⁴

3.15 Having summarised and had regard to the submissions received on our draft report, this report is confined to only include amendments we wish to make to our recommendations in our 2016 Final report.

⁴⁰ These are available on our website. Commerce Commission "[Investigation into Spark's resale voice services.](#)"

⁴¹ Chorus "Submission on the Draft Report on Spark's Resale Services" (17 May 2019) para 2. Spark "Spark submission on 2019 Draft report on whether Spark's Resale Services should be omitted from Schedule 1 of the Act" (17 May 2019) para 2.

⁴² Chorus "Submission on the Draft Report on Spark's Resale Services" (17 May 2019) para 2.

⁴³ [Commerce Commission "2019 Draft report on whether Spark's Resale Services should be omitted from Schedule 1 of the Telecommunications Act 2001"](#) (17 April 2019), para 1.9.

⁴⁴ [Commerce Commission "2019 Draft report on whether Spark's Resale Services should be omitted from Schedule 1 of the Telecommunications Act 2001"](#) (17 April 2019), para 1.9. Under clause 4(4) of Schedule 3 of the Act, we may, if we think fit, identify any recommendations included in the final report that we consider to be sufficiently related to each other that they ought to be considered together by the Minister.

3.16 In 2016, the three main reasons why we recommended not omitting Resale Services from Schedule 1 of the Act at that time were:⁴⁵

3.16.1 concerns about the ability of RSPs to migrate to alternative services;

3.16.2 concerns about the accessibility of those alternative services; and

3.16.3 our judgement as to the low cost and low benefit to omitting these services.

Ability of RSPs to migrate to alternative services

3.17 In our 2016 final report, we were concerned that RSPs' ability to switch to alternatives was constrained. We considered:⁴⁶

3.17.1 this could allow Spark to exercise market power in the absence of backstop regulation; and

3.17.2 the use of such market power might also disrupt competition to provide UFB services if RSPs' attention were diverted to provisioning analogue voice services.

3.18 We considered this constraint might diminish as RSPs enhanced their capability to utilise wholesale alternatives, and as Chorus increasingly automated the provisioning process for the Baseband IP services (Baseband IP and Baseband IP extended).⁴⁷

⁴⁵ Commerce Commission "Final report on whether Spark's Resale Services should be omitted from Schedule 1 of the Telecommunications Act 2001" (22 December 2016) X7.

⁴⁶ Commerce Commission "Final report on whether Spark's Resale Services should be omitted from Schedule 1 of the Telecommunications Act 2001" (22 December 2016) para 56.

⁴⁷ Commerce Commission "Final report on whether Spark's Resale Services should be omitted from Schedule 1 of the Telecommunications Act 2001" (22 December 2016) para 57.

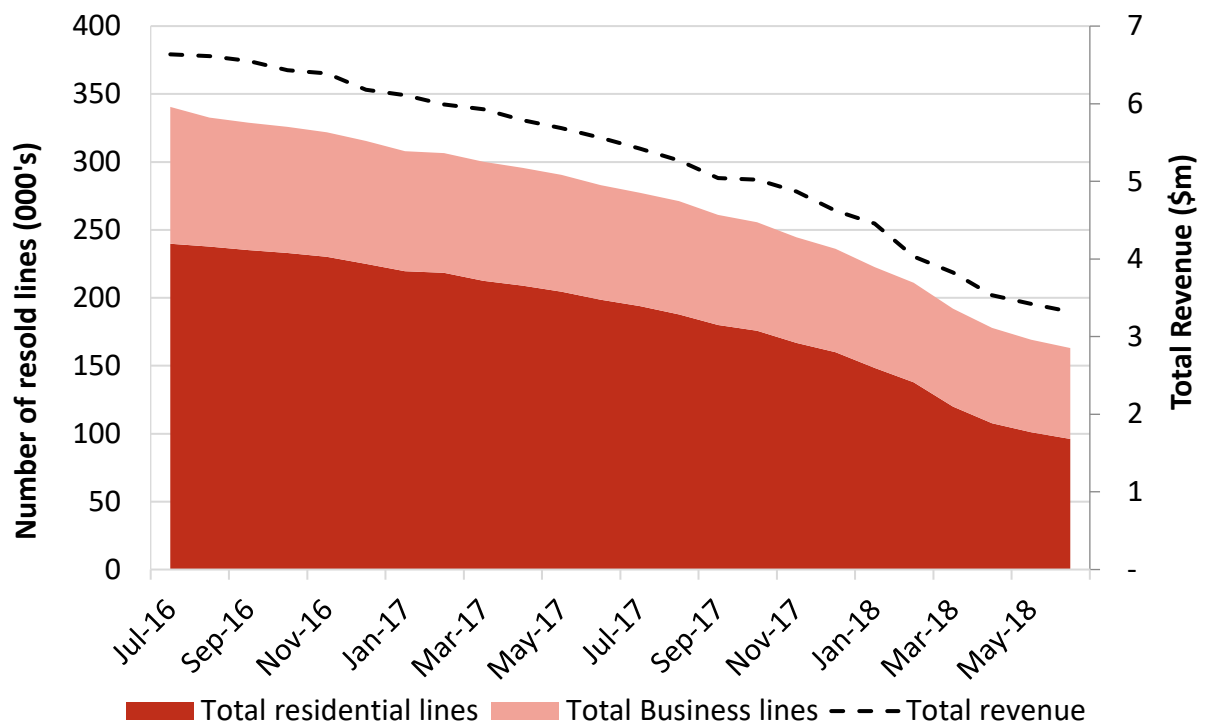
- 3.19 Trustpower Limited and Vocus Group NZ Limited noted in 2016 that although alternatives were becoming available (eg, Baseband IP), they were not sufficiently developed to be a competitive constraint to Spark's Resale Services.⁴⁸ Trustpower also indicated that a transition period of 2 to 3 years prior to the omission of Resale Services from Schedule 1 of the Act may be appropriate.⁴⁹
- 3.20 We have now updated our analysis to look at the change in the number of resold lines to assess whether RSPs have moved away from this service. Figure 3.1 shows the number of resold lines has decreased significantly since 2016 with total resold residential lines down by 60% from July 2016 to July 2018 and total resold business lines down by 34% over the same period.⁵⁰

⁴⁸ Commerce Commission "Draft report on whether Spark's Resale Voice Services should be omitted from Schedule 1 of the Telecommunications Act 2001" (23 September 2016) paras 73-81.

⁴⁹ Commerce Commission "Draft report on whether Spark's Resale Voice Services should be omitted from Schedule 1 of the Telecommunications Act 2001" (23 September 2016) para 78.

⁵⁰ We expressed this view in our 2019 draft report and retain this view for this Final report. [Commerce Commission "2019 Draft report on whether Spark's Resale Services should be omitted from Schedule 1 of the Telecommunications Act 2001"](#) (17 April 2019), para 3.14.

Figure 3.1 Total number of resold lines and associated revenue by month (Jul 2016-2018)⁵¹



3.21 In our view, the significant decrease in Resale Services provided by Spark since 2016 suggests that alternative services are likely to have become available and are being increasingly used by RSPs. Spark's revenue from Resale Services has also been decreasing at a similar rate to the drop in the number of resold lines. This suggests that Spark is constrained in its ability to raise prices to compensate for the lower volume of lines.⁵²

⁵¹ Information provided to us voluntarily by Spark following an information request. Note that the resold lines in this graph only relate to 'Local access and calling services offered by means of a fixed telecommunications network' and not to other Resale Services.

⁵² We expressed this view in our 2019 draft report and retain this view for this final report. [Commerce Commission "2019 Draft report on whether Spark's Resale Services should be omitted from Schedule 1 of the Telecommunications Act 2001"](#) (17 April 2019) para 3.15.

3.22 In its submission on our 2019 draft report, Spark considered that RSPs have now developed the capability to move to alternatives at scale. It noted:⁵³

Overall, Spark's landline revenues declined by almost 20% during H2 FY18. These declines highlight that alternative voice inputs and services provide an effective constraint on Spark's resale services.

Alternative services available

3.23 At the time of our 2016 final report, we considered that fully effective competitive alternatives to Spark's Resale Services were not yet available. Therefore, the decision to defer would enable RSPs to enhance their capability to utilise wholesale alternatives.⁵⁴

3.24 In our 2016 final report, we were concerned as to the costs and time required for Chorus to physically migrate end-users' lines over to the Baseband IP services and the ability of RSPs to migrate from the PSTN used to provide Resale Services to a Baseband IP service.⁵⁵

3.25 We also considered that the constraint on RSPs switching services would be likely to diminish over time, and Spark's incentives to provide a commercial service would increase, reducing the need for any regulatory backstop.⁵⁶

⁵³ Spark "Spark Submission – 2019 Draft report on whether Spark's Resale Services should be omitted from Schedule 1 of the Act" (17 May 2019) para 5.

⁵⁴ Commerce Commission "Final report on whether Spark's Resale Services should be omitted from Schedule 1 of the Telecommunications Act 2001" (22 December 2016) X7.

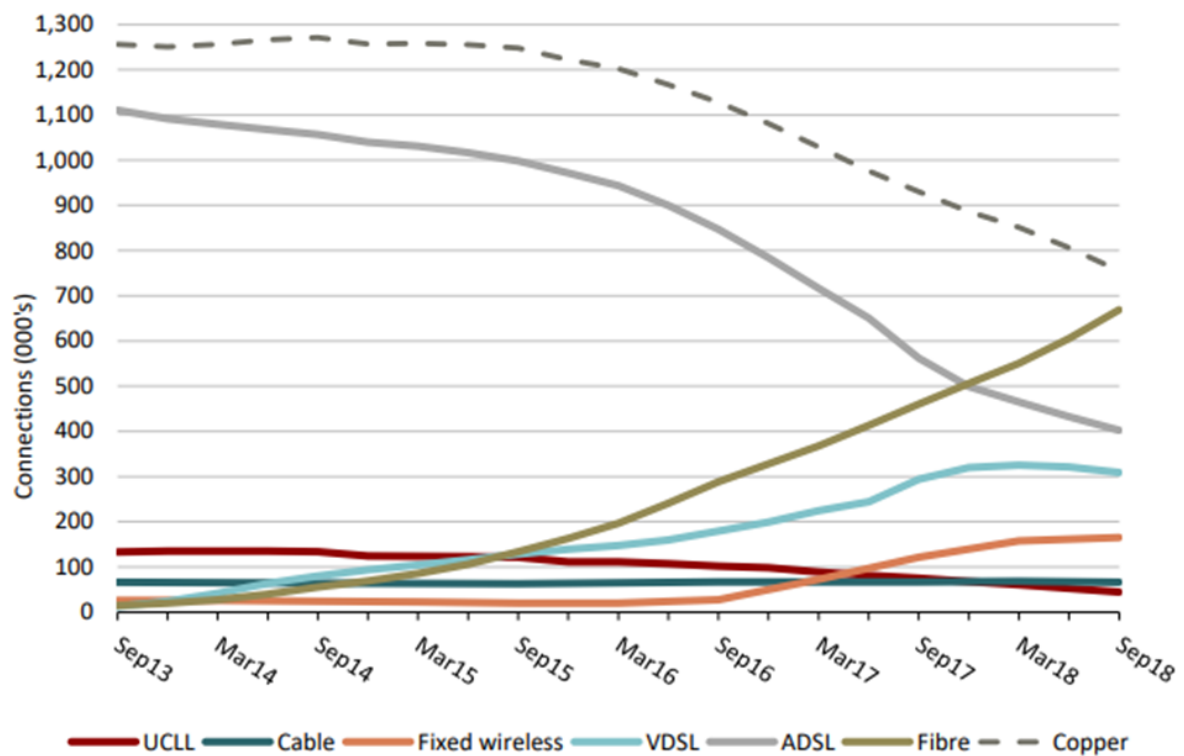
⁵⁵ Commerce Commission "Final report on whether Spark's Resale Services should be omitted from Schedule 1 of the Telecommunications Act 2001" (22 December 2016) para 88.

⁵⁶ Commerce Commission "Final report on whether Spark's Resale Services should be omitted from Schedule 1 of the Telecommunications Act 2001" (22 December 2016) X9.

- 3.26 We consider that the concern about available alternatives has reduced since 2016, as:
- 3.26.1 Chorus has since taken additional steps to support customer migration to Baseband IP;
 - 3.26.2 connection data shows migration away from Resale Services is taking place;
 - 3.26.3 we have seen a significant migration of users from copper-based to fibre-based services; and
 - 3.26.4 fewer than 4,000 homes are expected to be without access to government backed broadband (fibre and FWA) in four years.⁵⁷
- 3.27 Our 2018 monitoring report mentioned the migration away from copper-based services. Figure 3.2 shows this with fixed-line broadband connections by technology.

⁵⁷ The 4,000 reflects the Government's announcement at the end of 2018 that Government-funded broadband will reach 99.8% of population. See <<https://www.crowninfrastructure.govt.nz/wp-content/uploads/2018/12/RBI2-MBSF-expansion-fact-sheet-18-Dec-2018-FINAL.pdf>>

Figure 3.2 Fixed-line broadband connections by technology



Source: Chorus, MBIE, annual telecommunications questionnaire

- 3.28 We consider that the availability of these alternative services suggests that regulations on Resale Services are unlikely to have any impact on the current or future promotion of competition in telecommunications markets for the long-term benefits of end-users.⁵⁸
- 3.29 Chorus, the local fibre companies, and fixed wireless operators all have the infrastructure to offer alternative wholesale voice services to RSPs. However, there will be a very small number of end-users for whom the Spark voice service will be the only option. For these end-users, the price will continue to be capped by Spark's Telecommunications Service Obligation.

⁵⁸ We expressed this view in our 2019 draft report and retain this view for this final report. [Commerce Commission "2019 Draft report on whether Spark's Resale Services should be omitted from Schedule 1 of the Telecommunications Act 2001"](#) (17 April 2019), para 3.16-3.21.

- 3.30 We understand the number of end-users that will not have alternative options is likely to be approximately 4,000. The removal of the option of subjecting Resale Services to regulation for supply to these customers would reduce the ability of RSPs to compete for this specific group of end-users. However, we do not consider this reduces the ability of RSPs to compete in telecommunications markets for the long-term benefit of end-users more broadly.

Assessing the cost and benefits of regulation

- 3.31 Regulation incurs costs and can distort supply-side incentives. Telecommunications services should only be regulated where regulation best gives effect to the promotion of competition for the long-term benefit of end-users of those services.
- 3.32 In our 2016 final report, we noted that the benefits of removing the Resale Services from Schedule 1 of the Act included any avoided regulatory costs. Our view was that these avoided costs are low both for Spark and for us.⁵⁹ We continue to consider that direct costs of regulation are small. However, we consider that there are other indirect costs associated with continuing to apply regulation when it is no longer deemed necessary.
- 3.33 We consider deregulation would reduce or remove the indirect costs associated with these Resale Services, and that omitting the Resale Services from Schedule 1 of the Act best gives effect to the purpose in section 18.
- 3.34 For example, one potential impact of deregulation would be a signal to investors that we appropriately recommend deregulation of regulated services, when regulation is no longer required to meet our statutory objectives. This could potentially reduce investment costs across several currently regulated services.

⁵⁹ Commerce Commission "Draft report on whether Spark's Resale Voice Services should be omitted from Schedule 1 of the Telecommunications Act 2001" (23 September 2016) para 120.

- 3.35 Retaining backstop regulation for a service that can now be provided by a number of alternative technologies and services does not promote innovation or the efficiency of telecommunications providers.^{60 61 62}
- 3.36 Our view was supported by Spark's submission on the 2019 draft report, which noted:⁶³

The Commission rightly recognises that removing regulation and lifting regulatory powers is likely to give best effect to section 18 and to send efficient signals and incentives to market participants and investors.

⁶⁰ As required under s 18(2) of the Act, the efficiencies that will result or will be likely to result, from an act or omission must be considered.

⁶¹ As required under s 18(2A) of the Act, "...in determining whether or not, or the extent to which, competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand is promoted, consideration must be given to the incentives to innovate that exist for, and the risks faced by, investors in new telecommunications services that involve significant capital investment and that offer capabilities not available from established services."

⁶² We expressed this view in our 2019 draft report and retain this view for this final report. [Commerce Commission "2019 Draft report on whether Spark's Resale Services should be omitted from Schedule 1 of the Telecommunications Act 2001"](#) (17 April 2019), para 3.22-3.26.

⁶³ Spark "Spark Submission – 2019 Draft report on whether Spark's Resale Services should be omitted from Schedule 1 of the Act" (17 May 2019) para 7.

Attachment A Overview of the regulation of Resale Services

- A1 Resale Services provide RSPs with the ability to rebrand and on-sell a complete voice service to end-users. These services were included in Schedule 1 of the original Act in December 2001.⁶⁴
- A2 The Resale Services are:
- A2.1 local access and calling services offered by means of a fixed telecommunications network (local access and calling service);
 - A2.2 retail services offered by means of a fixed telecommunications network (Retail Services); and
 - A2.3 retail services offered by means of a fixed telecommunications network as part of a bundle (Bundled Services).
- A3 We outline each of the three Resale Services below.

Local access and calling service

- A4 This service covers the line rental and local calls. It is described in Schedule 1 of the Act as follows:

A local access and calling service offered by Spark to end-users by means of a fixed telecommunications network in the following markets:

- (a) all markets in which Spark faces limited, or is likely to face lessened, competition for the service;
- (b) all, some, or no markets in which Spark does not face limited, or is not likely to face lessened, competition for the service as determined by the Commission.

⁶⁴ Telecommunications Act 2001 (No. 103) (19 December 2001) Schedule 1 subpart 1 of Part 2. Available at www.nzlii.org/nz/legis/hist_act/ta20012001n103241/ These services were originally known by different names - 'Retail Services offered by means of Telecom's fixed telecommunications network' (now known as 'Retail Services offered by means of a fixed telecommunications network'); Residential local access and calling service offered by means of Telecom's fixed telecommunications network' (now known as 'Local access and calling service offered by means of fixed telecommunications network'); and 'Bundle of retail services offered by means of Telecom's fixed telecommunications network' (now known as 'Retail services offered by means of a fixed telecommunications network as part of bundle of retail services').

Retail Service

A5 This service includes value-added services like call waiting and call minder. It is described in Schedule 1 of the Act as follows:

A retail service that satisfies both of the following:

- (a) either of the following:
 - (i) a non-price-capped retail service (and its associated functions) supplying an access and calling service in a different form to a local access and calling service (and including, for the avoidance of doubt, a service supplying ISDN digital access, or Centrex-based access or facsimile); or
 - (ii) a value-added non-price-capped retail service that is supplied in conjunction with a service described in subparagraph (i) above or a local access and calling service; and
- (b) a retail service offered by Spark to end-users by means of a fixed telecommunications network in the following markets:
 - (i) all markets in which Spark faces limited, or is likely to face lessened, competition for that service:
 - (ii) all, some, or no markets in which Spark does not face limited, or is not likely to face lessened, competition for that service as determined by the Commission.

Bundled Service

A6 This service is described in Schedule 1 of the Act as follows:

A retail service that—

- (a) is, or has previously been, offered separately by Spark to end-users by means of a fixed telecommunications network; and
- (b) is offered by Spark to end-users as part of a bundle of retail services—
 - (i) in markets in which Spark faces limited, or is likely to face lessened, competition for that service; and
 - (ii) if the effect of the bundled price is likely to significantly reduce the ability of an efficient rival to contest the market.

Attachment B Our process

B1 Table B1 outlines our process in conducting this investigation.⁶⁵

Table B1 Our process

Decision or publication date	Overview of decision or process
April, 2016	Draft decision on our review of Designated and Specified Services under Schedule 3 of the Act as to whether there were reasonable grounds for commencing an investigation into whether any Resale Services should be omitted from Schedule 1 of the Act.
July, 2016	Final decision on our review of Designated and Specified Services under Schedule 3 of the Act concluded that there were reasonable grounds to commence an investigation into whether Spark's Resale Services should be omitted from Schedule 1 of the Act.
September, 2016	Draft report recommended that the Minister for Communications omit Spark's Resale Services from Schedule 1 of the Act one year after the date of the relevant Order in Council (a transition period). ⁶⁶
December, 2016	Final report recommended that the Minister for Communications should not omit Resale Services from Schedule 1 of the Act at that time and recommended that the decision as to whether Spark's Resale Services should be omitted from Schedule 1 of the Act should be deferred for two years. This was because we concluded that there may not have been fully effective competitive alternatives to the Resale Services and that the ability of RSPs to switch to alternatives may have been constrained. ⁶⁷
March, 2017	Minister for Communications accepted our recommendation to defer the decision for two years from the date of our final report. ⁶⁸
April, 2017	Telecommunications Commissioner confirmed that we would prepare a draft report in early 2019, in accordance with the process set out in cl 7 of Schedule 3 of the Act. ⁶⁹
April, 2019	Draft report on whether Spark's Resale Services should be omitted from Schedule 1 of the Act including giving public notice of the draft report in accordance with cl 7 of Schedule 3 of the Act. ⁷⁰
May, 2019	Submissions received on the 2019 draft report on whether Spark's Resale Services should be omitted from Schedule 1 of the Act. ⁷¹

⁶⁵ A full overview of the activity on these services prior to this current investigation is provided in [Commerce Commission "Review of Designated and Specified Services under Schedule 1 of the Telecommunications Act 2001 - Draft decision on whether to commence an investigation under clause 1\(3\) of Schedule 3 of the Telecommunications Act 2001" \(29 April 2016\) p 68 and 70.](#)

⁶⁶ [Commerce Commission "Draft report on whether Spark's Resale Voice Services should be omitted from Schedule 1 of the Telecommunications Act 2001" \(23 September 2016\).](#)

⁶⁷ [Commerce Commission "Final report on whether Spark's Resale Services should be omitted from Schedule 1 of the Telecommunications Act 2001" \(22 December 2016\).](#)

⁶⁸ [Office of Hon Simon Bridges "My decision on your recommendations about Spark's Resale Voice Services" \(27 March 2017\).](#)

⁶⁹ https://comcom.govt.nz/_data/assets/pdf_file/0022/61825/Letter-to-Hon-Simon-Bridges-re.-Sparks-Resale-Voice-Services-27-April-2017.PDF

⁷⁰ [Commerce Commission "2019 Draft report on whether Spark's Resale Services should be omitted from Schedule 1 of the Telecommunications Act 2001" \(17 April 2019\).](#)

⁷¹ Submissions on our 2019 draft report are available on our [website](#).