

Specified Points of Interconnection – Draft framework and decision relating to amending the s 231 notice and changes since 2019

**Tuatahi First Fibre Limited submission to the
Commerce Commission**

16 September 2022

Executive summary

1. Thank you for the opportunity to provide feedback on the Commission's paper *Specified Points of Interconnection – Draft Framework for Amending s 231 Notice*, dated 19 August 2022 (**Consultation Paper**).
2. The Consultation Paper seeks feedback on the Commission's:
 - 2.1. proposed framework for exercising its powers under s 231 of the Telecommunications Act 2001 (**Act**) in prescribing points of interconnection (**POIs**) and amending specified POIs (**SPOIs**); and
 - 2.2. draft decision prescribing Chorus' nine additional POIs which were approved under the UFB initiative after the date of the Commission's initial s 231 notice.
3. Establishing new POIs, and making changes to existing POIs, may be necessary in circumstances relating to network expansion, increased housing density within urban centres, resilience measures and natural disasters.
4. Where a new POI has been established or POI change implemented in accordance with the relevant processes under the Wholesale Services Agreement (**WSA**), s 231 of the Act provides the Commission with discretionary powers to prescribe the POI or (where the POI is already prescribed) amend the SPOI for the purposes of the Act. SPOIs are fibre handover points which define the upstream boundary of a regulated fibre service provider's fibre network, and so form a key element in determining the scope of fibre fixed line access services (**FFLAS**) for the purposes of Part 6 of the Act.¹
5. Tuatahi supports the Commission's approach in providing guidance on the process the Commission will follow when exercising its discretion under s 231. This level of transparency promotes greater confidence in, and certainty around, the operation of the Part 6 fibre regulatory regime.
6. We consider s 231 provides the Commission with a clear and straightforward role in prescribing POIs and amending SPOIs. The Commission will need sufficient information before being satisfied that a POI should be prescribed, or a SPOI amended.
7. However, we do not think s 231 requires or authorises the Commission to apply s 166. Applying s 166 may cause the Commission to exceed the scope of its s 231 powers, and would create an overly complex and onerous process for the Commission and regulated fibre service providers.
8. We encourage the Commission to reconsider the scope of its power under s 231, ensure the framework it proposes to apply sits within that scope, and ensure the resulting framework is proportionate to the Commission's role under s 231.
9. We discuss below the reasons for our view, and respond to the Commission's specific questions set out in the Consultation Paper.

Making changes to POIs: Tuatahi's processes

10. Tuatahi may only make changes to its POIs in particular circumstances in accordance with its WSA, and only after the applicable notice and change management processes have been administered.
11. Any change must also meet all applicable contractual and regulatory obligations.²

¹All of Tuatahi's FFLAS are subject to information disclosure regulation; Telecommunications (Regulated Fibre Services Providers) Regulations 2019, r 5.

² Including applicable obligations under the UFB initiative and enforceable undertakings entered into in accordance with Part 4AA of the Act.

12. At a high level, our WSA requires:³
 - 12.1. the change to be necessary to protect the security or integrity of Tuatahi's network or a particular POI in order to maintain the continuity of supply of FFLAS;
 - 12.2. a notice period of at least six months unless the change is required to respond to an emergency (in which case Tuatahi must provide as much notice as is practicable); and
 - 12.3. specified change management processes, including consultation with our customers (access seekers) to understand the implications of the change for our customers, and ensure all reasonable endeavours to mitigate costs to our customers are made.
13. There are a number of circumstances which we consider may make it necessary for Tuatahi to make changes to POIs, including circumstances relating to network expansion, increased housing density within urban centres, resilience measures and natural disasters.

Commission prescribing POIs and amending SPOIs

14. Section 231 of the Act provides the Commission with discretionary powers to prescribe POIs and amend SPOIs.
15. In our view, the Commission's role under s 231 is to prescribe a POI or amend a SPOI upon the Commission being satisfied (on information it has or receives) that a POI should be prescribed, or SPOI amended.
16. In circumstances where the Commission is prescribing a POI, we consider the Commission may do so upon the Commission being satisfied that the relevant industry processes have been completed (as outlined in paragraphs 10 to 13 above) and upon receiving relevant technical details (including POI identifier, name, address, and geographic area served) to enable the Commission to make the public notice. There is no additional analysis or decision which the Commission must, or is empowered to, make.
17. In circumstances where the Commission is amending a SPOI, we consider that the Commission may do so on receipt of the same information outlined in paragraph 16 above, and once satisfied the amendment is:⁴
 - 17.1. for an appropriate technical purpose; and
 - 17.2. is *consistent* with the purpose in s 162.
18. In contrast, the Consultation Paper proposes a far more complex process requiring substantial information, analysis, consultation, and decision-making by the Commission. This proposed process appears to have been constructed on the basis that the Commission has interpreted s 231 as requiring application of s 166. We discuss in the section below why we do not agree with that interpretation.

Exercise of s 231 powers do not trigger application of s 166

19. Our view is that the Commission exercising its powers under s 231 does not require nor authorise application of s 166.
20. Section 166(1) provides:
 - (1) *This section applies if the Commission or the Minister **is required** under this Part to **make a recommendation, determination, or decision**.*

³ See clause 3.1 of Tuatahi's [Services Agreement, General Terms](#) (January 2022). POIs are encompassed within the definition of "interconnection points".

⁴ Telecommunications Act 2001, s 231(4). We discuss further below the types of information the Commission may need for it to be satisfied that the amendment meets these thresholds (see our responses to questions 3 and 4 contained in the Consultation Paper).

(2) *The Commission or Minister must make the recommendation, determination, or decision that the Commission or Minister considers **best gives, or is likely to best give, effect**—*

(a) *to the purpose in section 162; and*

(b) *to the extent that the Commission or Minister considers it relevant, to the promotion of workable competition in telecommunications markets for the long-term benefit of end-users of telecommunications services.*

[emphasis added]

21. In contrast:

21.1. s 231 does not *require* any action to be taken by the Commission, because the Commission's powers under 231 are discretionary (i.e. the Commission *may* prescribe POIs and *may* amend SPOIs – there is no mandatory decision for the Commission to make); and

21.2. the Commission *prescribing* POIs, or *amending* SPOIs, is not a *recommendation, determination, or decision* for the purposes of s 166.⁵

22. The language used in s 231 does not oblige the Commission to act and, if the Commission does act, it must be satisfied (based on the information it holds or receives) that a POI may be prescribed, or a SPOI amended, before proceeding to exercise those powers. There is no separate decision the Commission is required to make capable of triggering application of s 166.

23. Further, we consider the Commission applying s 166 in circumstances where the Commission is amending a SPOI would make s 231(4)(b) *redundant* because:

23.1. s 231(4)(b) provides that the Commission must not amend a SPOI unless the amendment is *consistent* with the purpose in s 162;

23.2. applying s 166 would, at the same time, require the Commission to only amend the SPOI if the Commission considers the amendment *best gives, or is likely to best give, effect to* the purpose in s 162;

23.3. the '*best gives, or is likely to best give, effect to*' threshold in s 166 is a far higher threshold than the '*consistency*' threshold the Commission is explicitly required to apply under s 231(4)(b); and

23.4. the Commission applying the higher threshold in s 166 would consequently make redundant the lower '*consistency*' threshold explicitly required by s 231(4)(b).

24. We presume Parliament's intention is accurately reflected in s 231(4)(b), and it intended the Commission to apply the explicit '*consistency*' threshold (and not the higher threshold contained in s 166). This is important, as we think there could well be circumstances where amending a SPOI will not necessarily *give effect to* the purpose in s 162, but will be *consistent* with the purpose in s 162.

25. Finally, the Commission does not mention s 166 in its initial consultation or reasons paper relating to the making of the initial (19 December 2019) s 231 notice.⁶ Although s 231(5)(a) required the first notice made under s 231 to be based on the POIs that apply as at the close of 31 December under the UFB initiative, applying the Commission's interpretation contained in

⁵ There are a number of obligations in Part 6 under which the Commission (or the Minister) *is required* to make a *recommendation, determination, or decision*, clearly triggering application of s 166. For example: s 170(1) (requiring a determination specifying how information and price-quality regulation applies); s 177(3), (requiring the Commission to determine losses incurred by a regulated fibre service provider in providing FFLAS under the UFB initiative); and s 178 (requiring the Commission to determine input methodologies).

⁶ Commerce Commission "[Specified points of interconnection – Consultation paper](#)" (12 November 2019); Commerce Commission "[Specified points of interconnection – Reasons paper](#)" (19 December 2019).

the (19 August 2022) Consultation Paper, the Commission would still have been required to consider s 166 when prescribing the POIs in that initial notice.

26. If the Commission had turned its mind to s 166 as part of that process (as it considers it is now required to do), we would expect that to have been reflected in the initial consultation and reasons paper. As there is no mention of s 166 in either of those papers, we question what has led to the Commission's shift in view in the time between making its initial notice in 2019 and now.

Consultation questions

27. In this section we respond to the Commission's specific consultation questions.

Question	Tuatahi response
Framework for amending s 231 notice	
1. Does this Consultation Paper reflect the process administered by the NZ Telecommunications Forum? Please describe the consultation process within the industry if it differs.	The process identified by the Commission largely reflects the consultation process that is required to be followed under the WSA, where we would expect that process to be administered through the relevant TCF sub-forum.
2. How would the industry continue to ensure adequate opportunities for all interested parties to comment on any proposed change request? Who do you see as stakeholders?	<ul style="list-style-type: none"> • Our WSA requires us to consult with those who have signed our WSA, our customers, on POI changes. In our view, there aren't any other stakeholders who would have a vested interest in making changes to POIs (or the Commission's subsequent process to prescribe POIs or amend SPOIs). • In our view, the wider consultation process proposed by the Commission (i.e. in addition to the contractual consultation process under the WSA), is not required nor contemplated by s 231 and appears to be related to the Commission's interpretation that application of s 166 is triggered when exercising s 231 powers. We discuss in paragraphs 14 to 26 above why we think that interpretation is wrong. • The consultation process the Commission followed in making its first notice under s 231 is distinguishable from the subsequent process it will follow under s 231. This is because the Commission, in prescribing its first notice, required feedback on its interpretation of the relevant parts of the Act, and needed to ensure that the POIs it proposed to prescribe were accurate i.e. that the notice would capture all POIs that applied as at close of 31 December 2019 under the UFB initiative (as required by s 231(5)(a)).
3. What would you consider to be an appropriate technical purpose for adding or amending a SPOI?	<ul style="list-style-type: none"> • We note that it is only when the Commission is <i>amending</i> a SPOI, and not prescribing (adding) a new POI, that the 'appropriate technical purpose' criteria becomes relevant. • An appropriate technical purpose for <i>amending</i> a SPOI may include:

Question	Tuatahi response
	<ul style="list-style-type: none"> ○ the SPOI being, or forecast as being, at capacity; ○ traffic load distribution issues; ○ emergency management; ○ the location of a SPOI being incompatible with future growth needs; ○ access or affordability issues for access seekers; and ○ requirements relating to facility upgrades. • Ultimately, an 'appropriate technical purpose' could cover a range of different purposes, and could also depend on particular circumstances (for example, following an emergency).
<p>4. What principles or factors do you consider to be relevant in considering s 166 and s 162?</p>	<p>S 166</p> <ul style="list-style-type: none"> • For the reasons discussed in paragraphs 14 to 26 above, we do not think the Commission's exercise of power under s 231 triggers application of s 166. <p>S 162</p> <ul style="list-style-type: none"> • The Commission must not amend a SPOI unless the amendment is <i>consistent</i> with the purpose in s 162 (s 231(4)(b)). • For the Commission to be satisfied that the amendment to a SPOI is <i>consistent</i> with the purpose in s 162, the amendment must not contradict s 162, i.e., the amendment must not contradict the purpose to promote the long-term benefit of end-users in markets for fibre fixed line access services by promoting outcomes that are consistent with outcomes in workably competitive markets so that regulated fibre service providers: <ul style="list-style-type: none"> ○ have incentives to innovate and to invest, including in replacement, upgraded, and new assets; and ○ have incentives to improve efficiency and supply FFLAS of a quality that reflects end-user demands; and ○ allow end-users to share the benefits of efficiency gain in the supply of FFLAS, including through lower prices; and ○ are limited in their ability to extract excessive profits. • In our view, it should be self-evident and straightforward from information the Commission has or receives for it to be satisfied that a SPOI amendment is consistent with the purpose in s 162. An example of an amendment being <i>inconsistent</i> with that purpose would likely be a change to a POI made solely because it was in a regulated fibre service provider's financial best interests (and which would, in any event, not be permissible under the WSA).

Question	Tuatahi response
5. Do you agree that the Commission can impose conditions as part of its decision to amend the s 231 notice? Why/why not?	<ul style="list-style-type: none"> • No. The Commission has no inherent nor explicit power to impose conditions when prescribing POIs or amending SPOIs under s 231. • The Commission's view on imposing conditions appears to be based on its interpretation that s 166 applies when the Commission is exercising its powers under s 231. We disagree with that interpretation for the reasons discussed at paragraphs 14 to 26 above.
Prescribing Chorus' additional POIs	
1. Do you agree with our draft decision to prescribe Chorus' nine additional POIs approved under the UFB initiative? Why/why not?	We have no objection to the Commission prescribing the nine additional Chorus POIs.
2. Were any other POIs approved under the UFB initiative between 31 December 2019 and 1 January 2022?	We have not sought approval for any new POIs under the UFB initiative between 31 December 2019 and 1 January 2022.

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