



Review of Services in Schedule 1 of the Telecommunications Act 2001

Submission | Commerce Commission
24 March 2021

Introduction

1. Thank you for the opportunity to comment on the Commission's draft decision (**the draft**) that considers whether there are reasonable grounds to investigate omitting any of the relevant services from Schedule 1 of the Telecommunications Act 2001 (**Act**). The Commission is required to review periodically whether there are reasonable grounds to consider deregulating any Schedule 1 services.
2. We agree that considering whether to omit these services from the Act is not a priority at this stage. However, we recommend that the Commission considers developing deregulation guidelines – along the lines of the recently finalised non-discrimination and equivalence guidelines – to promote certainty for parties. The rolling back of regulation wherever possible – to minimise regulatory scope and promote competition – is a key component of the Part 2 and 6 regulatory framework.

Comment

Proposed approach

3. The Commission's draft decision is that there are not reasonable grounds for commencing an investigation into whether to omit:
 - a. Number portability on the basis that it promotes competition by reducing the barriers to switching as customers can retain their existing number¹. Porting volumes suggest that the service continues to play an important role in promoting competition².
 - b. Fixed PSTN interconnection on the basis that it is an access bottleneck to customers on other networks and an important input for off-net calls³. The Commission's reserve regulatory powers provide an important backstop and reference point for commercial negotiations⁴, and
 - c. Mobile co-location on the basis that it promotes competition by allowing access seekers to extend the geographic reach of their networks or facilitates mobile coverage expansion into unserved areas⁵. While less relevant in dense capacity driven areas, the ability to co-locate may remain an important option in remote areas⁶.

from Schedule 1 of the Act.

4. It is unclear to us that these services should continue to be regulated as operators, in practice, have incentives that likely make a regulatory backstop redundant. For example, the draft decision notes that:
 - a. The goal of regulated interconnection is to prevent discrimination between RSPs. However, operators can and do interconnect indirectly through other carriers and, in practice, it is not possible to discriminate in this way. If an operator tried, the traffic would simply be routed through another source.

¹ Draft at 64

² Draft at 67

³ Draft para 50

⁴ Draft para 55-56

⁵ Draft at 75

⁶ Draft at 79

- b. Mobile co-location remains an important option in remote areas, yet mobile operators face significant incentives to reduce costs and make efficiencies through the sharing of infrastructure, and we see significant sharing in practice.
5. Therefore, the Commission should consider – for example - whether the original purpose of regulating these services remains valid.
6. Nonetheless, we agree that an investigation in to whether or not to omit these services would be a material undertaking and is not a priority at this time. As noted in the draft, the Commission can return to the issue before the next mandated review in any case..

The Commission could usefully develop guidelines for rolling back regulation

7. In the interim, the Commission could consider developing guidelines for deregulation reviews in a similar way as it recently has for non-discrimination and equivalence practices. The guidance would set out how the Commission expects to apply the current high-level principles to future deregulation processes, promoting certainty for regulated providers and access seekers.

Deregulation is a key element of the regulatory framework

8. The Commission is required to undertake a deregulation review of Part 6 services before the start of each regulatory period in any case and the proposed guidelines could support that review. In practice, the Commission Part 6 deregulation review will need to start well ahead of this date so that any decisions can be reflected in to the 2025 PQ process.
9. Further, a related policy debate is emerging in the context of the expenditure proposal:
 - a. Chorus has proposed that wider and corporate innovation be funded through the BBM on the basis that demand for innovative downstream services will drive FFLAS demand⁷. The Commission rightly highlighted the proposal and sought feedback from interested parties.
 - b. Trustpower in effect argues that the wholesale service and prices should be structured to negate retailers developing economies of scale and scope⁸ and to support smaller retailers⁹.
10. We do not support these submitters' proposed approaches:
 - a. Chorus' proposal would have the effect of bringing industry innovation into the BBM, inevitably monopolising innovation in our market; and
 - b. Trustpower's preferred model ultimately bounds the role of access seekers to that of an LFC reseller, discouraging deeper access seeker investment and innovation in our sector.
11. The Act is premised on competition best promoting innovation and minimising the scope of regulation (so that it maximises potential competitive activity) to promote competition. The Commission will decide its approach for the purpose of the PQ process and Deeds.

⁷ Chorus Our Fibre Assets from page 104

⁸ Trustpower submission on Chorus expenditure proposal at 2.1.5

⁹ Trustpower at 2.1.10

12. However, if the Commission agrees that the promotion of competition requires minimising the effect of regulation on competitive parts of the market, then deregulation is a key element of the regulatory framework. In other words, if the Commission is seeking to maximise the scope for competition in our sector, then it should actively remove regulation to support the framework and promote end user interests. This is something for which guidelines would promote certainty, and could possibly be a useful further input methodology.

Providing guidance on how the Commission will apply high level deregulatory principles

13. At this stage, the Commission's framework provides little guidance on how it will consider deregulation. At the high level, the Commission considers:

- a. Whether the service continues to be necessary to best promote competition.
- b. Whether the service may be having a negative impact and so should be removed, and
- c. In considering these outcomes, the Commission will consider competitive developments at the retail level, the degree to which competition relies on the regulated whole service, changes in consumer preferences, technology change, wholesale substitutes, competitive constraints at wholesale or retail, and the likely costs and benefits of regulation¹⁰.

14. However, while a useful high-level framework, this level of detail does not provide guidance on how these factors are expected to apply to regulated services and regulatory outcomes, or what regulatory success looks like.

15. Further, in practice, Schedule 1 reviews tend to focus on the deregulatory effect on wholesale providers and customers rather than a prospective assessment of the market with and without regulation. There is little consideration of the purpose of regulating and how the market might evolve without regulation. For example, the Commission deferred rolling back PSTN resale regulation to mitigate migration programme risk for wholesale customers already transitioning customers to their own infrastructure and did not deregulate the service until Spark was already planning to disestablish its PSTN network. With the benefit of hindsight, it is clear the Commission took an overly conservative approach.

16. Similarly, unused regulated services should not be retained simply to act as a "regulatory backstop" - it is very likely the costs of this approach outweigh the benefits - and equally likely the Commission could achieve the same outcome in lower cost ways. For example, by publishing guidelines or benchmarking that signals to industry what price and non-price terms industry arrangements should reflect.

¹⁰ Criteria varies slightly across MTAS 2020 and current consultation.

17. Therefore, we recommend the Commission develop further guidance on its regulatory and deregulatory approach for our market. This could follow the approach taken to non-discrimination and equivalence where the Commission provided guidance on how it would apply the broad principles set out in the Deeds and the Act. The guidance could include, amongst other things, how the Commission thinks about:
- a. The market dynamics and level of dependence on regulatory interventions.
 - b. The regulatory framework, the purpose of the intervention and the promotion of competition it is expecting to see in the context of telecommunications markets.
 - c. The role deregulation plays in that framework and how it will consider deregulation to support those outcomes, and
 - d. The criteria it will apply to determining whether specific services are deregulated.

[End]