

Draft assessment framework for fibre deregulation review

**Cross submission
22 March 2024
PUBLIC VERSION**

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Cross submission

1. This is Chorus' cross submission in response to the Commerce Commission (**Commission**) seeking feedback on the draft assessment framework for a reasonable grounds assessment (**Draft Framework Paper**), published on 7 December 2023.
2. We have engaged with this process based on representations made by the Commission in its Draft Framework Paper. Specifically, the Commission seeking feedback on its proposed framework for considering whether reasonable grounds exist to commence a deregulation review.¹ There was no indication in the Draft Framework Paper that the Commission was inviting views and evidence on whether such reasonable grounds exist at this stage of the process. The submissions received suggest the scope of this stage of consultation was insufficiently clear. In prior submissions we have expressed concerns about this process. The confusion around the scope of this consultation compounds those.
3. In this cross-submission we address points made by submitters including whether reasonable grounds exist to commence a review. This is not a complete statement of Chorus' views and evidence on whether reasonable grounds exist to commence a review as it would not be appropriate to introduce these in a cross-submission. We will provide this at a further stage of the consultation where this is clearly within scope.
4. This is the public version of this submission.

Overall reflection – review does not present a binary choice

5. Some submitters approach the consultation as if a review would present a binary choice between preserving the status quo or total deregulation. This is not the Commission's task under s210, which explicitly contemplates incremental change to the application of price-quality (**PQ**) or information disclosure (**ID**). A review under s210 presents the opportunity to ensure the regulatory framework for FFLAS is optimally calibrated given current and likely future market conditions.
6. A decision to commence a review does not represent a conclusion that regulated providers are unlikely to have substantial market power (**SMP**) in any FFLAS markets. It simply acknowledges that market developments mean there is a question to be asked about whether the application of regulation under Part 6 could be adjusted to better meet the purpose statement. This distinction is important and, in our view, the need to ask that question is beyond doubt.
7. Moreover, the Commission acknowledges that in deciding whether to conduct a deregulation review it must make the decision that best gives, or is likely to best give, effect to the purpose statement, and to the extent relevant, to the promotion of workable competition in telecommunications markets. Given that:
 - 7.1 the Commission is empowered under s 210 to take a granular approach to reviewing application of PQ or ID to any FFLAS; and
 - 7.2 it is clear that the constraint on at least some FFLAS has changed significantly since the current application of regulation was determined,a decision that there are no reasonable grounds for any review would be inconsistent with section 166.

¹ Commerce Commission, *Fibre fixed line access service deregulation review under section 210 of the Telecommunications Act – Draft assessment framework paper*, 7 December 2023, paragraph 1.2.

8. A decision to review the application of PQ and ID is more likely to promote the section 162 purpose and, where relevant, promote workable competition, than a decision not to conduct a review.

Points of agreement

Regulation in other LFC areas

9. Enable and Tuatahi state that their ID obligations provide no benefit to consumers since competitive pressures deliver all the benefits regulation is designed to achieve. They submit that a review should be undertaken with a view to removing ID from FFLAS provided by them. In our view:
 - 9.1 The case made by Tuatahi and Enable is persuasive *at least* to the point of providing reasonable grounds to commence a review of FFLAS regulation in those areas;
 - 9.2 Chorus is subject to ID but not PQ regulation in areas in which other LFCs have deployed fibre network under the UFB initiative. This is because policymakers decided it would be disproportionate to apply PQ regulation to Chorus in areas where other LFCs have the largest fibre market share but are only subject to ID regulation.² If ID were removed from LFCs, preserving this principle of proportionality would require that ID-only regulation be removed from Chorus in those areas; and
 - 9.3 Consistent with the points made by Enable and Tuatahi, ID-only regulation of Chorus FFLAS in these areas imposes costs without benefit for consumers. We agree that a review should be undertaken with a view to removing ID from FFLAS provided by Chorus in areas where other LFCs have a fibre network.

Constraint from FWA

10. We agree with Spark³ that there is competition between fibre and FWA in certain segments:

“for example, wireless is increasingly a viable substitute to fibre for some customer segments based on the nature, profile of their demand – in particular those segments that do not use broadband for low-latency gaming or that have lower data requirements”.
11. In the Appendix to this submission, we provide our own evidence of how competition from FWA is affecting our fibre services. **[CHORUS CI]**. We also draw the Commission’s attention to evidence provided in response to the Commission’s consultation on the competition impacts of the acquisition by OneNZ of Dense Air.⁴
12. Other respondents contended that FWA is not an economic substitute for FFLAS.^{5,6} We disagree and would emphasise that substitutability does not require equivalence. Two differentiated products can compete with each other without being ‘perfect substitutes’. FWA does not need to provide an equivalent experience to FFLAS for the two to be substitutes. What matters is the ability to provide a product that satisfies a customer’s demand along the key product dimensions for broadband. FWA can and does constrain fibre services without being a perfect substitute or complete equivalent.
13. The emergence of FWA as a substitute for FFLAS and the constraint it provides, together with the fact it is increasing, demonstrates alone reasonable grounds exist to commence a review of how FFLAS are regulated.

² Cabinet Paper, *Telecommunications (Regulated Fibre Service Providers) Regulations 2019*, 12 November 2019.

³ Spark, *Fibre de-regulation review draft assessment framework paper*, 16 February 2024, paragraph 22.

⁴ Chorus, *Submission on One NZ and Dense Air clearance application*, 19 February 2024, paragraph 6.

⁵ 2degrees, *Public submission on deregulation draft assessment framework*, February 2024.

⁶ BTG, *Public submission on deregulation draft assessment framework*, February 2024.

Reference date for change

14. The only detailed comment received on the reference date for considering change in circumstances⁷ supported changing the reference date to when the final decisions on the form of regulation were made in December 2016. We agree with Enable and Tuatahi that this is the most appropriate comparison point for assessing change in circumstances.

Points of clarification or disagreement

Treatment of SMP

15. Some respondents⁸ suggest that a deregulation review centres on whether SMP exists, assert that Chorus has SMP, and conclude that there is no need for a review. We disagree:
 - 15.1 The presence or absence of SMP cannot be determined without defining a market. We reiterate our submission that the Commission should undertake suitable analysis to understand the market and propose appropriate market definitions when considering reasonable grounds to review.
 - 15.2 As noted above, a review is not a binary choice between the status quo and full deregulation. The continued existence of SMP in one or more markets does not mean the framework is perfect and its application shouldn't be changed to better meet the Part 6 purpose statement.
 - 15.3 A review provides the opportunity to make incremental improvements to ensure the regulation remains fit for purpose by including a cost-benefit analysis and focus on whether the costs of regulation outweigh the benefits.

Consideration of individual FFLAS

16. Spark contends that a narrow focus on each FFLAS will not adequately draw out the issues necessary to inform a review and that evidence of strong competitive constraints across a broad range of FFLAS services would be required to justify taking the next step of a deregulation review.⁹ This position is inconsistent with the statutory framework. Section 210 invites the Commission to review how **one or more** FFLAS are regulated under Part 6. To say that strong constraint across a broad range of FFLAS is required to even commence a review is inconsistent with the statutory expression that application of Part 6 to even a single FFLAS can be reviewed.
17. However, we do agree with Spark's statement that the dynamic and differentiated nature of competition in our sector creates additional complexity. Spark questions how the Commission will consider competition for the purposes of a deregulation review - and continued regulation of residual services - where the constraint is only for a particular customer segment or segments.¹⁰
18. These points are well made, and our view is that the answer to such complexity is not to avoid it by foregoing a review altogether, but rather to consider the practical implementation and implications of any change(s) identified as desirable in a review as part of that review process. The object should be to accommodate any changes in a way that best gives effect to the purpose of the regulation and minimises disruption and costs. Chorus has absolutely no desire to be subject to an overly complex, piecemeal regulatory framework that imposes strange incentives and carries massive allocation risk.

⁷ Enable, Tuatahi, *Public Submission on deregulation draft assessment framework*, February 2024, paragraph 4.5.

⁸ 2degrees, *Submission on deregulation draft assessment framework*, February 2024, and OneNZ, *Submission on deregulation draft assessment framework*, February 2024.

⁹ Spark, *Fibre de-regulation review draft assessment framework paper*, 16 February 2024, paragraph 8-9.

¹⁰ *Ibid* at paragraph 21-23.

Use of FFLAS backhaul by mobile networks

19. OneNZ claims¹¹ that FWA relies on FFLAS backhaul and that removal of regulation would affect the provision of backhaul services, however:

19.1 MNOs have extensive fibre backhaul networks. They can and do build their own fibre backhaul to mobile access points. OneNZ gave a presentation to Infratil investors on 4 March 2024 in which it indicated an intention to establish a 'separate fibre entity'.¹² The presentation notes that OneNZ has '4,200+ km' of access fibre which is described as 'exchange nodes to business premises and selected mobile towers'.

19.2 This indicates MNOs have genuine build vs buy decisions which constrains Chorus' mobile access FFLAS and therefore limits our ability to price freely. The very real ability of vertically integrated customers to self-supply, and the inability of Chorus to access retail markets except through these customers, operates as a real constraint on Chorus.

19.3 Even if the contention were true, it would present an argument for continued application of regulation to a single type of FFLAS – mobile access services. It would not follow that a review of the application of regulation to any and all FFLAS is unnecessary.

Geographically consistent pricing

20. Mercury states¹³ that Chorus proposed to relax the requirement to provide geographically consistent pricing (**GCP**) in our PQP2 proposal. No citation was provided for this assertion. We would clarify:

20.1 We understand GCP applies automatically to all FFLAS subject to PQ regulation and can therefore only be removed from any FFLAS by changing the form of regulation to ID-only or removing regulation altogether. Any relaxation of GCP on services which remain subject to PQ regulation would require legislative change.

20.2 It may be that Mercury is referring to the proposal we made (in response to the Commission's process and approach paper for PQP2) to remove the reporting requirement for GCP compliance.¹⁴ This was about reducing the compliance reporting burden rather than changing the application of GCP. We stand by this proposal as the current reporting requirement is entirely disproportionate to the risk of harm to end-users from potential non-compliance. It requires significant resource commitment for negligible benefit. There can be no question of GCP non-compliant pricing approaches being hidden as pricing of FFLAS is always transparent through ID and PQ price compliance.

FFLAS price changes

21. OneNZ commented that since 1 January 2022 Chorus has increased wholesale charges for some services by up to nearly 12% (including an 11.8% rise in the wholesale input cost of the most popular fibre plan, Fibre 300). It comments that the fact no significant number of customers have switched to alternatives is evidence that customers do not see alternatives as substitutes for fibre.¹⁵ In response:

21.1 **[CHORUS CI]**; and

¹¹ OneNZ, *Submission on fibre fixed line access service deregulation review*, paragraph 11.b

¹² OneNZ, *Infratil Investor Day Presentation*, 5 March 2024, slide 4. Available at: <http://nzx-prod-s7fsd7f98s.s3-website-ap-southeast-2.amazonaws.com/attachments/IFT/427438/414257.pdf>

¹³ Mercury, *Public submission on deregulation draft assessment framework*, February 2024.

¹⁴ Chorus, *Submission on the process and approach paper for PQP2*, paragraph 64-66.

¹⁵ OneNZ, *Submission on fibre fixed line access service deregulation review*, paragraph 8.

21.2 This claim overlooks the fact that the 11.8% price increase to Fibre 300 occurred against a 13.6% increase in CPI¹⁶ and therefore represents a price decrease in real terms. It is odd to expect this to cause a significant number of customers to switch away from fibre.

22. In fact, Chorus' approach to fibre access pricing is a strong indicator of the existence of competitive constraint rather than its absence:

22.1 Prices for several FFLAS products have been reduced or held steady in nominal terms – for example Home Fibre Starter;

22.2 The price of the broadband anchor service is set below the regulated price cap; and

22.3 Chorus offers a broadband access service with substantially higher performance at the same price as the anchor service.

¹⁶ Stats NZ, CPI to March 2022 (6.9%) and CPI to March 2023 (6.7%). Available at: <https://www.stats.govt.nz/indicators/consumers-price-index-cpi/>

Appendix: [CHORUS CI]