

Copper Withdrawal Code Review – Draft Decision

9 November 2023

C H ● R U S

Executive summary

1. Thank you for the opportunity to submit on the Commerce Commission's (**Commission**) Copper Withdrawal Code (**Code**) review draft decision.
2. The purpose of the Commission's Code review is to determine if amendments to the Code can better meet the requirements of the Act, including whether improvements to the Code could make it more effective and workable.

Copper withdrawal experience to date

3. Chorus' feedback to the Commission is based on over two years' experience of operationalising the Code. The Commission has accepted that there are a number of scenarios that the Code does not adequately cover, or for which more flexibility would be beneficial, and we support these draft decisions.
4. We are pleased the Commission has taken on board a number of issues we have raised around workability and adopted several of our proposals. These changes will provide better outcomes to consumers by improving consumer engagement and certainty as well as improving the overall process to be more flexible and efficient for the industry. However, the Commission has missed more substantive areas where the Code is not workable, especially around inability to install fibre due to third party constraints.
5. In our view taking a "workability" lens means actively addressing these situations, not just defaulting to a "copper in perpetuity" model on the grounds that consumer protection requires this absolute stance. In the absence of Code changes that adequately address the remaining issues, the Commission is effectively permitting a Code that perpetuates "partial copper withdrawal".
6. To illustrate the impacts of "partial copper withdrawal", between March 2021, and 7 November 2023, we have:
 - Completed 11 copper withdrawal batches, with 6 batches underway
 - Sent 40,403 copper withdrawal notices
 - Withdrawn 31,454 copper services
 - Emptied 695 copper cabinets
7. However copper services that remain after completion of copper withdrawal process have a significant impact on our planned withdrawal programme. For instance, 374 copper services are still active from the 11 completed batches, which has prevented 181 cabinets and 72 exchanges from being decommissioned.
8. This tells us that the Code process does not work for a small proportion of unresolved fibre installations - and while these only represent a very tiny proportion

(<2%)¹ of copper services which have been part of our completed copper withdrawal batches, these stalemates have a significantly disproportionate impact on the overall programme, preventing ~20% of cabinets in the copper withdrawal programme from being decommissioned. This impact is compelling and, in our view, strongly suggests that the Code requires further amendments to achieve workability. That is, enhancement of the Code so it both protects consumers and facilitates actual withdrawal, in line with its dual purposes.

9. We acknowledge that there is a balance to be struck between consumer protection and facilitating actual withdrawal. But our experience demonstrates that the pendulum has swung too far towards an expectation that the inability to install fibre due to a third party omission or obstruction justifies copper to remain in perpetuity.

Overall impact of partial copper withdrawal

10. New Zealand's copper withdrawal programme can only succeed if complete decommissioning of the copper network takes place. We've seen this happen in Norway where in 2022, Telenor Norge completed the decommissioning of its copper network allowing it to deliver more energy-efficient services and reduce its environmental impact by saving 14GWh of electricity consumption per year – as it moved consumers onto more modern and energy efficient technologies.²
11. In comparison, we estimate that current copper withdrawal activity planned will see ~9.5GWh reduction in electricity use – this will save ~1,140tCO₂e in carbon emissions each year and significantly reduce our scope 2 emissions inventory. But this is based on our forecast of decommissioned cabinets and assumes that all copper services within a batch are moved off copper. If New Zealand, like Norway, is able to decommission its entire copper network this would result in significantly greater reduction of emissions from energy savings.
12. However, this is unlikely to be the case under the current Code process. While the Commission's draft decision introduces flexibility into the process, actual copper withdrawal at a network level cannot take place unless cabinets and exchanges can be decommissioned.
13. Copper services, and the aging copper network, cannot be kept in service indefinitely for a small and decreasing population who may prefer copper, or may have tricky landlords, neighbours or strong opinions that copper should last forever.
14. Relying on copper as a backstop service even though fibre, and other technologies, are available will not necessarily benefit consumers overall. The average cost to maintain and operate copper will significantly increase over time as the number of copper users decreases, however, current copper prices will not be sufficient to cover these costs. A slow transition to fibre will increase the risk of economic stranding

¹ There were ~374 unresolved copper services that equates to approximately 2% of all copper services (21,272) that were part of the 11 completed batches, as at the date of this submission. Some of these unresolved copper services may eventually be resolved, or may be due to unrelated issues, but this figure provides a good indicator of the likely overall impact that a small number of unresolved services has on the programme as a whole.

² Annual Report 2022, Telenor Group, <https://www.telenor.com/binaries/investors/reports-and-information/annual/annual-report-2022/Annual%20Report%202022.pdf>, see pages 14 and 42.

caused by higher average costs³ and increase the amount of unnecessary cost that needs to be recovered from consumers – reducing productive efficiency.

15. Our proposed Code changes will provide flexibility in the process by better dealing with the variety of consumer scenarios that can arise during the copper withdrawal process, while balancing consumer protection and facilitating actual copper withdrawal. Ultimately, we want this process to help consumers move to a better technology that is future-proofed to meet their modern household needs, help New Zealand become more emission friendly, and save cost and complexity by reducing the number of 're-run' copper withdrawal batches.

Summary of recommendations

16. While we support most of the Commission's draft decisions we **recommend** the below changes, which build on our previous proposal. These proposals will help improve consumer clarity and understanding, facilitate actual copper withdrawal and support Chorus' – and New Zealand's – climate change targets.

a. Remove the ability for third parties to prevent copper withdrawal after a reasonable period of time

- We recommend amending the Code to enable copper to be withdrawn where there is a third party issue preventing a fibre installation, and that issue remains in place after a reasonable period following placement of the order by the consumer. We consider three months is a reasonable period of time, as third party issues that are unresolved in that time are likely to continue. This Code amendment would be framed in the Code as an additional exception to the requirement for a connection to a fibre service to be installed.

b. Remove the Continuation Notice requirement for late, or in progress, fibre orders

- We recommend removing the requirement to issue Continuation Notices where a consumer has placed a late fibre order or their fibre order is still progressing. Continuation Notices would only apply where Chorus has not met its Code obligations by the end of the notice period, but not where a fibre order is still in progress. This is because the time of issuing a Continuation Notice (no later than one month after the notice period), would likely fall within the 'reasonable timeframe' for late fibre orders.
- Instead, Chorus would:
 - Communicate in the Final Notice / Notice 3 that existing fibre orders in progress, or if a consumer places a fibre order before the end of the notice period, their copper service will remain until the fibre order is complete; and

³ The Commerce Commission has previously acknowledged the risk of economic stranding in pricing decisions, see: [Commerce Commission, Fibre Input Methodologies: Draft decision – reasons paper](#), dated 19 November 2019 [at 3.486].

- Where a late, or in progress, fibre order has not been able to be installed within a reasonable timeframe, Chorus would then issue a Continuation Notice where after three months the fibre order has not been installed (subject to the exception we recommend introducing to address unresolved third party issues).
- If the Commission does not accept the proposal to communicate the outcome in the Final Notice / Notice 3, an alternative option is to introduce a separate notice for these, such as Notice 4, in which Chorus would advise the consumer that they have an “order in progress” and the copper service will remain until the order is complete.

Draft decisions we support

17. We strongly support the Commission's decision to amend the Code for the following:
- a. **Changing the notices to "Notice 1, 2 and 3" and introducing flexibility to the notice name** – this will help improve consumer understanding about the sequence of the process and what each notice means
 - b. **Clarifying definitions** – this clarifies the timeframes in the copper withdrawal process to better reflect the actual copper withdrawal date
 - c. **Allowing notice delivery to an alternative address and flexible communications channels** – this will help consumers who need or prefer notices to be provided via other communication channels, particularly those who may need to seek assistance
 - d. **Adding a notice period pause during an extreme of unforeseen event** – this will help consumers during challenging events and allow for any unforeseen delays caused by such events. However, we request that the requirement (in clause 60 of the draft Code amendment) following such an event for Chorus to "immediately" lift the pause and notify all relevant parties that the pause has been lifted is amended to provide for this to be done "as soon as reasonably practicable". "Immediately" may not be reasonable, especially following an extreme event where there are a number of urgent matters to be dealt with. Our suggestion of "as soon as reasonably practicable" puts the onus on Chorus to act reasonably and not delay, while acknowledging that the timeframes may require some flexibility depending on the circumstances.
 - e. **Removing the Confirmation Notice** – to help reduce consumer confusion about the status of their copper services
 - f. **Duration between notices** – this allows greater flexibility to improve the timing of the notification process and where appropriate, help drive consumers to take more urgent as well as catering for public holidays.
18. These Code changes support Chorus, retailers, and the relevant fibre service providers to achieve better outcomes for consumers during the copper withdrawal process.

Chorus recommendations

Address fibre installation delays due to acts or omissions of third parties

19. As we raised in our original submission, the scenario where a third party has prevented a fibre installation from going ahead is a major impediment to copper withdrawal as the Code is currently drafted. The current drafting of the Code fails to adequately address situations where third parties have prevented fibre installation, and Chorus is therefore unable to withdraw fibre. In our view, the appropriate resolution is for the Code to specifically provide for Chorus to be able to withdraw copper in such situations after a reasonable time has passed for the affected parties to with resolve the issue.
20. In its draft response the Commission has stated that it considers it does not have the ability to provide for such an exemption, given the baseline requirement in the Act that a fibre service connection “is installed” for copper withdrawal to proceed.
21. In our view this is legally incorrect, and the Commission needs to consider and interpret the Act’s minimum requirement to provide for the consumer to have fibre installed in light of the purpose of the Code, which includes consumer protection and the facilitation of the withdrawal of copper. The Commission has already recognised this in its existing Code exception to the requirement that fibre must be installed (the exception where the end consumer has not acted reasonably). Therefore, the Commission has already acknowledged that the requirement for fibre to be installed is not an absolute one. The legal basis for the Commission to exercise its powers to provide an exception to the requirements for fibre to be installed is further explained in the legal opinion advice from Chapman Tripp which is being provided separately to the Commission.
22. The Commission’s interpretation of consumer protection appears to be almost solely focussed on preventing copper withdrawal (affecting a whole exchange) where a single consumer’s fibre installation has not been completed. While Chorus supports the purpose of consumer protection to ensure consumers have adequate information and an appropriate time period to move to an alternative technology, we consider it unreasonable to interpret consumer protection in such a way that a single incomplete fibre installation for a premises could prevent the decommissioning of an entire copper cabinet. As well as failing to consider other options available to the consumer, preserving copper as a never-ending default means there is no real pressure on the third party to actively engage with and/or facilitate the installation.
23. We find it encouraging that Consumer NZ, the body set up with the express purpose of ensuring New Zealand consumers are given a fair deal, supported Chorus’ position that where third party issues extend beyond a reasonable time, Chorus should not be required to keep the copper service running.⁴ We are surprised that the

⁴ Page 4, Consumer NZ submission on Copper Withdrawal Code Review: https://comcom.govt.nz/__data/assets/pdf_file/0029/317198/Consumer-NZ-Submission-on-Copper-Withdrawal-Code-Review-Request-for-Views-04-May-2023.pdf

Commission has taken a narrower and more prescriptive view of consumer protection than that advocated by the consumer protection entity.

24. The Commission has not addressed how the purpose of facilitating copper withdrawal is met by preventing copper withdrawal in these third party scenarios. The only suggestions the Commission has for resolving third party issues preventing fibre installation are the utilisation of existing legislative avenues, and the introduction of a 45-day pause.
25. The Commission suggested that Chorus “explore further”⁵ the existing avenues of (i) property access rights under the Telecommunications Act (**property access rights**) and (ii) provisions in the Residential Tenancies Act (**RTA**), that are intended to prevent landlords from withholding consent to fibre installation requested by a tenant. The efficacy of these is addressed below.

Acknowledge limitations of existing avenues for resolving third party issues

26. Chorus is currently utilising the property access rights and the RTA regimes to the extent possible. While these facilitate fibre installations in some circumstances, neither of these avenues is designed to address the specific issues raised in the copper withdrawal context, and both have legal and practical limitations that limit their efficacy. As a result, these avenues are not a satisfactory solution to the issue of third party constraints preventing fibre installation, as we expand on below.

Property Access Rights

27. The Telecommunications Act provides Chorus (and other LFCs) with the right to access certain shared property (such as driveways, etc) for the purposes of fibre installation, where the installation is a prescribed installation. We rely on our access rights to facilitate the property access required to carry out such installations where applicable. However, the key limitation of this avenue in resolving third party installation issues is that property access rights are not necessarily the main cause of third party stalemates in the copper withdrawal context. The main issue is a third party refusing to provide consent to fibre installation in the first place, which is not addressed by the property access rights under the Telecommunications Act.
28. Even where small sub-group of installations are prevented or delayed due to property access, property access rights are not a complete solution for several reasons:
 - a. None of the statutory rights apply in the case of non-prescribed installations (s 155ZC). The prescribed installations in the Telecommunications (Property Access) Regulations 2017 address some access issues but fail to resolve a significant proportion.
 - b. There are several grounds for an affected person to object to access rights, and these are sometimes used by third parties to block fibre installations regardless of the merits of such claims. These grounds can include a

⁵ At para 125 of the Draft Decision.

“materially negative impact” on property value, unreasonable impact on enjoyment of the property or impeding development plans for the property. Body corporates have further grounds to object including interference with telecommunications services or contractual obligations.

- c. If any objection cannot be resolved, it can be referred to Utilities Disputes (UDL). The UDL Annual Report for 2021-20222 notes that the average time to dispose of shared property access disputes is nearly two months once accepted. If UDL upholds an objection such that the installation cannot go ahead, Chorus has no right of appeal to the District Court. While a person who placed a fibre order has a right of appeal, in practice there are various practical reasons why they may not wish to do so, including the cost of proceeding to the District Court and uncertainty as to any outcome.

Expiry of property access rights regime

29. In addition to the existing limitations of the property access regime, the statutory rights of access only apply up until 1 January 2025. After this date, Chorus and end-users who want fibre installed will have no ability to require access where this is dependent on third party consent. Therefore, rather than the Commission’s supposition that Chorus may be able to better utilise the property access rights regime, in fact we will soon be further constrained in our ability to resolve some hurdles to installation. Our expectation is that this will negatively impact on our ability to complete fibre installations – so while third party access rights are not currently a major issue for copper withdrawal, there is a real risk that this will change and the number of unresolved third party issues will increase. This will further limit the workability of the Code in facilitating the purpose of copper withdrawal.

Use of the Residential Tenancies Act

30. The Commission also suggests that Chorus consider further utilisation of the RTA, which includes certain limitations on landlords’ ability to refuse consent to a fibre installation. While these relatively new provisions of the RTA theoretically assist tenants in obtaining landlord permission for fibre installation, our experience is that it is of limited use in facilitating landlord consent in many situations.
31. This is due to various reasons, including that Chorus’ own ability to unilaterally utilise the RTA is limited. This is because the RTA puts the onus on tenants to seek their landlord’s consent to a fibre installation. This means a landlord has to actively consent to a fibre installation, so if the landlord simply does not respond, that is an “unlawful act” under the RTA, but in practice does not resolve the issue by allowing the fibre installation to progress. There are various grounds for landlord refusal, which could be used spuriously by a landlord to block or delay consent. Illegitimately refusing or withholding consent can only be resolved by the tenant taking the matter to the Tenancy Tribunal, which is costly and time-consuming.
32. The assumption that tenants are in a position to always utilise this framework, and that it will result in the landlord consenting to fibre installation, fails to recognise the common power imbalance between tenants and landlords. Our experience is that many tenants are unwilling to invoke the RTA against their landlords – and even if

they do file a request, they are unwilling to pursue landlord consent refusal via the Tenancy Tribunal – likely due to a fear of retaliation or simply prioritisation of other tenancy issues (rent disputes, heating and damp, etc). Put simply, most tenants would rather “toe the line” rather than risk losing the roof over their heads.

33. In addition, in terms of Chorus’ ability to encourage utilisation of the RTA, we usually don’t know whether a tenant has tried to use the RTA or where in the process the tenant and landlord might be. While some tenants may provide this information when asked, in general tenants are reluctant to discuss this information with Chorus and see preserving their immediate relationship with their landlord as paramount, even where this means their fibre order cannot be fulfilled.
34. Our view that the RTA provides only a limited practical tool for tenants is borne out by a search of decisions on the Tenancy Tribunal website, which shows that there have been only six claims alleging a breach of s 45B, and only two had awards made in the tenant’s favour. In both successful claims, the outcome has been an award of damages in favour of the tenant, rather than requiring the landlord to facilitate the fibre connection.
35. The Commission has acknowledged that uncertainty is undesirable for consumers, but both the RTA and property access regime are uncertain for consumers seeking third party consent, given the limitations noted above. The Commission also fails to address uncertainty of the existing “unreasonableness” exception, discussed below.

Recognise that the existing “unreasonableness” exception and the introduction of a 45-day pause is limited

36. The Commission appears to suggest that Chorus should place greater reliance on the property access regime and the RTA. It is possible that the Commission expects that if fibre has not been installed and a consumer has not followed these processes through to their endpoint, Chorus will rely on the “unreasonableness” exception to withdraw copper on the basis that the consumer has not acted reasonably.
37. Chorus has relied on the “unreasonableness” exception in limited cases, usually where the consumer has continually refused to engage with Chorus after placing its order or has suddenly ceased engagement after an initial contact. However, we consider reliance on this exception is both insufficient and unworkable for many situations. One of the problems with the scope of the exception is that it is difficult for Chorus to determine whether or not a consumer has acted reasonably. This is particularly true where there is a third party constraint and we do not see all the communications between the parties, in which case it is difficult to assess whether we could rely on the exception that the consumer has not taken all reasonable steps.

Proposed 45-Day pause

38. The Commission has proposed introducing a 45-day pause as a solution to third party stalemates preventing fibre installation following a consumer’s order. We support this pause as a useful tool to enable some third party issues to be resolved within the Code timeframe, and therefore avoid a Continuation Notice (and restarting of the process for copper withdrawal in future).

39. However, the “pause” mechanism only addresses delay – it does not provide a substantive mechanism for resolving third party issues. If the issue is refusal of consent by a landlord or other third party, delaying the process 45 days is unlikely to change this (especially given the timeframes required to see through a UDL or Tenancy Tribunal process). If a third party knows that the only avenue Chorus has is a “pause”, that party is not incentivised to sort the issue out and can simply wait Chorus out. In these situations, Chorus would not be able to withdraw copper unless Chorus relies on the existing “unreasonableness” exception. Modifying the Code to enable withdrawal where an issue remains unresolved would remove this incentive to continue a stalemate situation indefinitely.

Amend Code to provide exception for inability to connect fibre due to unresolved third party issue

40. Given the limitations of existing avenues for resolving third party constraints, and the operational reality that such constraints are a significant limitation on copper withdrawal, it remains our view that situations where fibre installation cannot proceed due to third party issues should not be able to indefinitely prevent copper withdrawal. We therefore reiterate our recommendation that the Code is amended to enable us to withdraw copper where an order for fibre is unable to be completed due to a third party constraint that remains unresolved for three months following the order.
41. We consider that the Commission has over-estimated the potential harm to consumers of this approach and under-estimated the benefits to consumers of wider facilitation of copper withdrawal. In our view the availability of this exemption is likely to incentivise resolution of third party issues in many cases. If the backstop of a continuing copper service were actually taken away, the third party’s (often a landlord) own interests in enabling and ensuring connectivity at the premises would result in that party agreeing to install fibre (where ordered). Even if it did not, the likely availability of alternative technologies means that consumers are unlikely to be left without any connectivity.
42. The purpose of “consumer protection” should not be considered solely in terms of preserving one premises’ existing copper connection, but also take into account the overall harm done by the inability to withdraw copper for multiple cabinets due to a tiny proportion of incomplete fibre installations, thus materially preventing copper withdrawal on the scale and in the timeframes Chorus has planned for. Preventing the withdrawal of copper cabinets due to a single unresolved fibre installation is an out of proportion response in the name of consumer protection that significantly impacts the overall copper withdrawal programme, creating ongoing costs which will ultimately have to be borne by consumers and felt by other industry participants, particularly retailers. As noted above, it also reduces the opportunity to optimise energy savings and help New Zealand meet its environment targets.

Remove Continuation Notice requirement for late fibre orders and in progress orders

43. We disagree with the Commission's decision to retain Continuation Notices in the Code where fibre orders are still in progress at the time Chorus needs to assess its copper services and issue Continuation Notices. The Commission's reasoning appears to be based on circumstances in which a consumer has ordered a retail fibre service after receiving the Final Notice / Notice 3 but during the Notice Period because the 'withdrawal date' is subject to change and Chorus needs to follow the relevant minimum requirements.
44. It is unclear how this would work because the Commission is proposing to allow a consumer to place an order on the last day of the notice period and then no later than a month after, the consumer will receive a notice that their copper won't be removed. To meet the Continuation Notice deadline, Chorus must assess and issue the notice before 20 working days / one month to allow for delivery – in practice this means late orders that are not complete within 10 working days will receive a Continuation Notice.
45. A Continuation Notice should be limited to situations where there is a failure to install. We maintain that the Commission should remove the Continuation Notice from the Code for instances where a consumer's fibre order is placed late in the process, or still in progress. In our view, the Commission's strict approach is not reflective of the requirement to permit late fibre orders and risks unnecessarily deferring the copper withdrawal process by a minimum of six months where a fibre order is in progress. This is because the Continuation Notice can create an incentive for consumers to cancel their fibre order after receiving the Continuation Notice, which then means they will likely fall into a future batch and their copper withdrawal process re-starts. Therefore, the current approach leaves no room for instances where we have neither met nor failed to meet our requirements under the Code because a fibre order is in progress.
46. In our view, the Commission should be more flexible in determining a 'reasonable timeframe' for late fibre orders as required under the (new) clause 27.12 which requires Notice 3 to explain that consumers can order a retail fibre service before the notice period ends. This sentiment is carried through in clauses 40.2 and 41.1 which note consumers can order fibre after receiving their Final Notice / Notice 3 and the fibre should be installed within a reasonable timeframe. The Commission has acknowledged the validity of a late fibre order, yet the Code does not seem to reflect this sentiment in practice when it comes to assessing compliance and therefore the Continuation Notice requirement.
- 47. We recommend removing the Continuation Notice requirement for late, or in progress, fibre orders:**
- We recommend removing the requirement to issue Continuation Notices where a consumer has placed a late fibre order or their fibre order is still progressing. Continuation Notices would only apply where Chorus has not met its Code obligations by the end of the notice period, but not where a fibre order is still in progress. This is because the time of issuing a Continuation Notice (no later than one month after the notice period), would likely fall within the 'reasonable timeframe' for late fibre orders.

- Instead, Chorus would:
 - Communicate in the Final Notice / Notice 3 that existing fibre orders in progress, or if a consumer places a fibre order before the end of the notice period, their copper service will remain until the fibre order is complete; and
 - Where a late, or in progress, fibre order has not been able to be installed within a reasonable timeframe, Chorus would then issue a Continuation Notice where after three months the fibre order has not been installed (subject to the exception we recommend introducing to address unresolved third party issues).
- If the Commission does not accept the proposal to communicate the outcome in the Final Notice / Notice 3, an alternative option is to introduce a separate notice for these, such as Notice 4, in which Chorus would advise the consumer that they have an “order in progress” and the copper service will remain until the order is complete.