

20 November 2018

Hon. Kris Faafoi  
Minister of Broadcasting, Communications and Digital Media  
Parliament Buildings  
Wellington

Dear Minister Faafoi

**Request for deferral in implementation deadline of fibre regulatory regime**

1. This letter is a request for your deferral of the implementation date for introducing the new regulatory framework for fibre fixed line access services, under clause 7 of Schedule 1AA of the Telecommunications Act (the Act).
2. We ask that you defer the implementation date by two years from 1 January 2020 to 1 January 2022.
3. We need the extension to enable us to deliver New Zealand (including consumers and the telecommunications sector) a robust and effective regulatory regime for fibre fixed line access services.

*Background*

4. The Act requires the Commission to implement a new regime for fibre fixed line access services, including the following interconnected steps:
  - 4.1 establishing the detailed upfront rules called input methodologies;
  - 4.2 setting the price-quality regulation for Chorus (based on the developed input methodologies) for an initial period of three years; and
  - 4.3 setting enduring information disclosure regulation (also based on the developed input methodologies) for Chorus and the Local Fibre Companies (LFCs).
5. The Act also requires the Commission to undertake work in related areas of telecommunications regulation by 1 January 2020, including:
  - 5.1 deregulating legacy copper services in areas where fibre is available;

- 5.2 beginning work on retail service quality codes; and
- 5.3 developing a copper withdrawal code that governs how Chorus can remove existing services that use the legacy copper network.

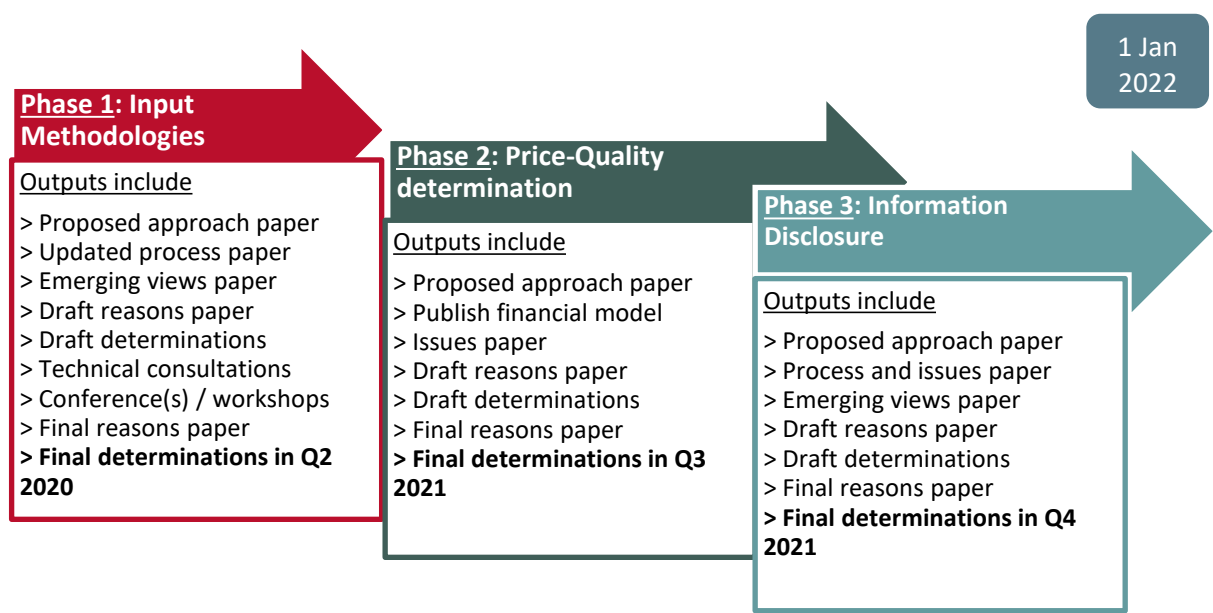
*Request for extension to 1 January 2022*

6. Our request for an extended implementation date of 1 January 2022 is based on:
  - our understanding of the new provisions in the Act;
  - our experience of developing and implementing similar regimes under Part 4 of the Commerce Act for electricity networks, gas networks, and airports; and
  - feedback from stakeholders concerned about the current timeframe.
7. We consider the proposed extended commencement date of 1 January 2022 is achievable but still remains ambitious. By way of comparison, it took some four years to complete similar regimes under Part 4 of the Commerce Act.

*We are proposing a phased approach*

8. We have based this extension request on a strong analysis of the work that needs to be done and an ambition to undertake it robustly and efficiently. There is a need for three phases of work to be undertaken to give effect to the new regime:
  - 8.1 **Phase 1:** Develop and publish input methodology determinations over the initial 20 month period, with expected completion in Q2 2020.
  - 8.2 **Phase 2:** Develop and publish a price-quality regulation determination for Chorus over the 12 month period following publication of the input methodologies, with expected completion in Q3 2021.
  - 8.3 **Phase 3:** Develop and publish information disclosure regulation determinations for Chorus and the LFCs in Q4 2021.
9. While there is some concurrent work that can be done with a view to expediting the process, Phase 1 (the input methodologies) must be completed before they can be applied to Phases 2 and 3 (the price-quality regulation and information disclosure determinations). **Figure 1** sets out the proposed phasing approach and highlights the outputs needed in each of those phases.

**Figure 1: Proposed Phases and expected outputs**



*Reasons for extension request*

10. We set out the need for a longer timeframe for implementation in our fibre regime funding paper that we published in April this year.<sup>1</sup> We have also canvassed this in our submission to the Economic Development, Science and Innovation Select Committee regarding the Telecommunications (New Regulatory Framework) Amendment Bill.<sup>2</sup>
11. As the Bill passed in November 2018, the implementation date of 1 January 2020 leaves us only 13 months to complete the entire regime.
12. At the high level, we consider there is a need for a longer implementation timeframe to enable robust regulatory development (a view echoed and supported by stakeholders), ensure the needed expert resources, and to provide certainty.
13. We believe extensive consultation will be an essential element of creating a workable and durable regulatory framework in relation to all three phases of the work.
14. Without the extension, we consider that there is a greater risk of appeals of our final determinations, which would likely lead to extended periods of uncertainty. We note there were two judicial reviews and 16 merit appeals (with 58 distinct challenges) in

<sup>1</sup> See Implementation of the New Regulatory Framework for Telecommunications: Funding discussion paper here: <https://comcom.govt.nz/regulated-industries/telecommunications/regulated-services/fibre-regulation/implementation-of-the-new-regulatory-framework-for-telecommunications>

<sup>2</sup> See submission to the Select Committee here: [https://www.parliament.nz/en/pb/sc/submissions-and-advice/document/52SCED\\_EVI\\_74818\\_417/commerce-commission](https://www.parliament.nz/en/pb/sc/submissions-and-advice/document/52SCED_EVI_74818_417/commerce-commission)

relation to the December 2010 input methodologies set under Part 4 of the Commerce Act. These challenges created uncertainty for the regime until December 2013, when the final judgment was made by the High Court. We succeeded on 56 of the 58 challenges. Had we lost a greater number of challenges, we may have needed to make significant changes to the input methodologies and the price path.

*Stakeholder engagement is essential*

15. Effective stakeholder engagement at regular intervals throughout our work programme is the key to ensuring that we deliver a reliable and robust regime. We have already commenced consultation with stakeholders through an invitation to comment on proposed approach published on 9 November.<sup>3</sup>
16. To allow enough time for effective stakeholder engagement, we consider that Phase 1 will take 20 months for develop input methodologies that encompass each of the following areas, as required by the Act:
  - 16.1 Cost of capital;
  - 16.2 Asset valuation;
  - 16.3 Allocation of common costs;
  - 16.4 Treatment of tax;
  - 16.5 Quality dimensions;
  - 16.6 Regulatory rules and processes (e.g. Specification of price, reconsideration of price paths, pass-through costs etc.); and
  - 16.7 Capital expenditure.
17. Industry and consumer stakeholders have stated that they share our concerns that the 1 January 2020 deadline will not allow industry time to engage with our processes. For example, in response to our discussion paper on Funding for the New Regulatory Framework, Transpower set out:

*We caution that compressed timetables can affect the extent to which stakeholders, particularly consumers and smaller service providers, can meaningfully engage with the process (a point made at the Commission workshop). In our view, the 18 months proposed by the Commission to develop the fibre IMs [input methodologies] appears highly challenging.*
18. Internet NZ also emphasised the importance of the extending the implementation deadline:

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<sup>3</sup> See proposed approach paper here: <https://comcom.govt.nz/regulated-industries/input-methodologies/fibre-input-methodologies>

*We also share concerns raised at the workshop that tight timelines will be challenging for stakeholders and the Commission, making adequate funding and extension of the implementation deadline vital, especially for meaningful consumer engagement.*<sup>4</sup>

19. We are also conscious that there are new types of input methodologies for the fibre regime (that are not part of the existing Commerce Act regime) and that industry will need time to understand, have input in, and respond to. These new input methodologies cover quality dimensions, and capital expenditure.<sup>5</sup>
20. We consider that four to six weeks for industry responses to each of our required publications in Phase 1 (including process and issues papers, draft and final determinations), and then a further two weeks for cross-submissions from stakeholders is consistent with good regulatory practice.<sup>6</sup> This amounts to roughly 48 weeks of consultation for Phase 1. Time will also then be needed to consider the stakeholder views and develop the next output.
21. **Figure 2** sets out our proposed process steps across Phase 1 and the 20 months (an earlier version of this figure was shared with stakeholders at a staff-led workshop in May).

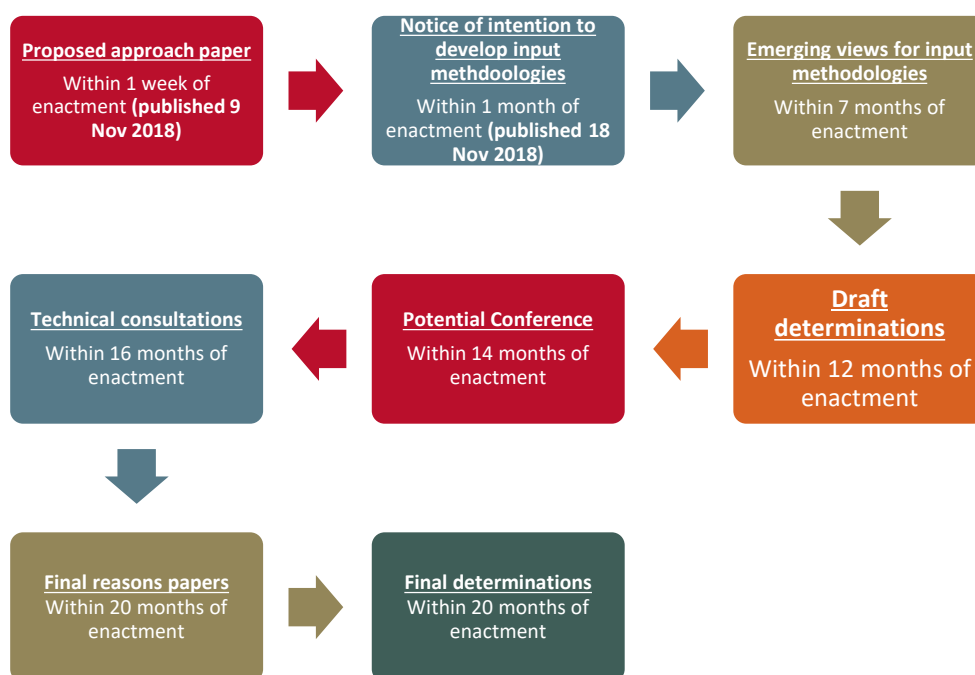
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<sup>4</sup> See both Transpower and Internet NZ's response in our letter to MBIE setting out the expected cost of implementing the new fibre regime – 15 June 2018:  
[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0029/86195/Letter-to-MBIE-setting-out-the-expected-cost-of-implementing-the-new-fibre-regime-15-June-2018.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0029/86195/Letter-to-MBIE-setting-out-the-expected-cost-of-implementing-the-new-fibre-regime-15-June-2018.pdf)

<sup>5</sup> Note that we have previously developed an IM for capital expenditure as part of our regulatory regime for Transpower; this was not required in the first iteration of input methodologies developed under Part 4 of the Commerce Act.

<sup>6</sup> Cross submissions are when we invite stakeholders to comment on others' submissions.

**Figure 2: Indicative process steps for Phase 1<sup>7</sup>**



22. Until we have completed Phase 1 we cannot be certain about the exact timing of the outputs for Phases 2 and 3. This is because the work carried out through Phases 2 and 3 will be underpinned by what is determined in the input methodologies. At this stage, we estimate that each Phase 2 and 3 will each likely take a year each to reach final determination stage. Even with an extension we will need to (and intend to) overlap phases 2 and 3 to ensure the process is as expedient as possible and meets the extended timeframe we propose.

*Expert resources are limited*

23. Another factor relevant to time is the technical and expert resources available (both to the Commission and to stakeholders) to undertake detailed aspects or review of the work as it progresses.
24. The pool of resources is limited by the expertise needed and capacity available. This is not something that can be overcome by increased funding, rather it goes to the expert nature and availability of resources.

*Ensuring certainty*

25. We are aware that Chorus has expressed concerns over perceived impacts on investor certainty in the event of delays to the implementation date for the regime. We believe the proposed approach of phasing the work addresses that concern by prioritising the development of certain critical input methodologies (such as cost of

<sup>7</sup> Further explanation of each of these outputs is set out in **Attachment 1**.

capital and asset valuation) during Phase 1. This will provide a high level of certainty about our approach to key questions relating to the setting of prices for Chorus in Q2 2020. We also consider that providing this certainty early is key to delivering the best outcomes for consumers.

26. We are also of the view that investor certainty is best delivered through a durable, stable regulatory regime, suitable for the long term. A less durable or lower quality regime could result from tight timeframes and have the impact of reducing investor certainty.
27. We believe that any uncertainty caused by a short term delay in the implementation of the regime introduced by an extension can be managed through mechanisms set out in the legislation, including:
  - 27.1 anchor services (i.e. basic voice and broadband services available at reasonable prices) will have fixed prices for three years;<sup>8</sup>
  - 27.2 existing contracts for all fibre services will roll forward at 2019 prices until the new implementation date; and
  - 27.3 when determining the price-quality regulation, we can adjust the maximum revenues that Chorus can recover in order to account for prices charged between 2020 and 2022. This means that we can ensure consumers are not negatively impacted in the long term due to the delay of implementation of price-quality regulation for Chorus.

### *Conclusion*

28. We ask that you consider deferring the implementation date for the fibre regime to 1 January 2022. We believe this would allow for a regulatory regime of appropriate durability and workability to be developed and would therefore represent the best outcome for New Zealanders.
29. Please do not hesitate to contact me if you have any questions or would like to discuss further.

Yours sincerely



Dr Stephen Gale  
Telecommunications Commissioner

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<sup>8</sup> Note that we do have the ability to conduct a review of the anchor services before the start of each regulatory period.

## **Attachment 1: Further details on the necessary outputs and consultation steps**

1. In order to reach final determinations for the fibre input methodologies, there are a number of outputs required to be published for stakeholder consideration throughout the different steps of the process. The indicative timings of these outputs were set out in **Figure 1** of the letter.
2. This attachment sets out the purpose of each of these outputs, which are set out in **Table 1** below.

***Table 1: Purpose of the outputs required to reach Final determinations of fibre input methodologies***

<b><u>Output</u></b>	<b><u>Purpose</u></b>
<b>Invitation to comment on proposed approach for input methodologies (published 9 November 2018)</b>	This paper signals to stakeholders when we will be seeking their input across the project, and will seek submissions / views on our initial view of challenges in the IM development.
<b>Notice of intention (published 19 November 2018)</b>	When we begin work on the input methodologies, we are required to give public notice of our intention to do so under (s. 178(1)) of the Telecommunications Act. The Notice of Intention fulfils this requirement.
<b>Emerging views paper</b>	To seek views on our emerging thinking on different topics before progressing to draft decisions.
<b>Draft reasons paper</b>	To seek stakeholder feedback on the Commission's draft decisions and reasons on the matters that are relevant to the development of the input methodologies for fibre.
<b>Draft determinations</b>	To seek stakeholder views on the draft determination that we develop following our reasons paper.
<b>Technical consultations</b>	To seek stakeholder views on whether the drafting within our draft determinations reflects the intention within our decision papers; i.e. the reasons papers.



<b>Workshops</b>	We may hold workshops to explain our thinking and hear stakeholder feedback.
<b>Conferences</b>	As per s.178(2) of the Telecommunications Act, the Commission may hold 1 or more conferences to gain stakeholder views. In our work in Part 4, these have typically been held towards the end of the IM development process.
<b>Final reasons paper</b>	To finalise our decisions, and reasoning for those decisions
<b>Final determinations</b>	The finalisation of the input methodologies, as per s.177 of the Telecommunications Act.