

Declaration of anchor and direct fibre access services

Consultation response

C H ● R U S

Executive summary

1. We support the policy underlying the anchor and direct fibre access service regulations and believe they play an important part in ensuring the workability of the overall Part 6 framework.
2. We do not agree with the approach taken in the exposure draft of anchor and direct fibre access service regulations (**Draft Regulations**). The approach is inconsistent with the requirements of the Telecommunications Act 2001 (**Act**) because it provides for regulations incorporating service descriptions and conditions which are materially different from those set out in the UFB contracts.
3. The Draft Regulations take a detailed and prescriptive approach to setting the terms for a voice anchor service and a broadband anchor service (together **Anchor Services**) and the direct fibre access service (**DFAS**). This is unnecessary when considered in the market context in which Chorus operates, and having regard to the other restrictions on Chorus imposed by the regulatory framework. It is also clear from the legislative context that Parliament did not intend such a prescriptive 'standard terms determination' style approach to Anchor Services and DFAS regulations.
4. The approach to the Draft Regulations is likely to have an adverse impact on Chorus, our retail service provider customers (**RSPs**) and, ultimately, consumers because:
 - 4.1 All Chorus UFB services are currently provided under one contract that is familiar to RSPs with service descriptions, service levels and operational processes that evolve as technology changes and Chorus improves its offerings. RSPs will have to enter into separate contracts in order to take DFAS and the Anchor Services. Those contracts will freeze the services with reference to documents at a particular point in time and RSPs taking the services will be denied the benefits of technology evolution and process improvement;
 - 4.2 For convenience, we are likely to offer 'parallel products' which replicate the key features of the Anchor Services and DFAS but on our standard commercial terms. However, we will be required to maintain the systems and processes necessary to support Anchor Services and DFAS as prescribed. The costs of this inefficient duplication will ultimately be borne by consumers as Chorus recovers those costs through service pricing to RSPs on the rest of its fibre portfolio; and
 - 4.3 The Draft Regulations are complex and their requirements vague and uncertain. It will be difficult for Chorus to assess its own compliance, and for the Commerce Commission to monitor.
5. The approach to the Draft Regulations is aimed at prioritising certainty over flexibility. This is unnecessary, and the Draft Regulations are so complex they fail to provide certainty in any event. We've included with this submission our near-final Chorus Services Agreement for 2022 (**2022 CSA**). This is to show the terms on which we propose to provide Anchor Services and DFAS from 2022 if an alternative approach is adopted to permit this. We have done this to show there is no uncertainty in detailed commercial terms which needs to be resolved by regulation.
6. It is possible to set regulations which meet the requirements of the Act and ensure the policy aims of Anchor Service and DFAS regulations are achieved in a practical, low-

cost way. In this submission we set out how this can be done including providing alternative draft regulations which reflect this approach.

7. The Draft Regulations incorporate price caps which will be incorrect from 1 July 2021 and a CPI adjustment mechanism at variance with that set out in the Act. We have set out the correct price caps based on a CPI increase to the relevant services approved by Crown Infrastructure Partners (**CIP**) in May 2021. We think the current statutory CPI adjustment cycle should continue under the regulations enabling Chorus to align price changes across all fibre services at the same time, which we understand RSPs value.
8. The Act includes specific provision for DFAS regulations to discharge Chorus of its pre-existing obligation to provide DFAS under its Open Access Deeds of Undertaking. This provision was included to avoid double regulation of the same service on different terms for different purposes and prevent double jeopardy. We strongly believe DFAS regulations should include this.

Approach to regulations

Inconsistency with Telecommunications Act

9. We believe the approach taken in the Draft Regulations is inconsistent with the requirements of the Act.
10. The Draft Regulations set the service descriptions for the regulated services by reference to our existing fibre reference offer. They also incorporate by reference other documents from the fibre reference offer, as well as TCF service descriptions and technical standards 'to the extent relevant' to the service descriptions.
11. For the first set of Anchor Service and DFAS regulations, the Act provides the Minister must not recommend regulations that prescribe a description of the service, or conditions of the service, that are materially different from the terms set out in a UFB contract.¹
12. The term 'UFB contract' is defined as a contract between CIP and a UFB partner entered into as part of the UFB initiative.²
13. The fibre reference offer, which sets out an offer of standard terms of service between Chorus and RSPs, was produced by Chorus to comply with obligations under the Fibre Open Access Deed,³ and obligations under the UFB funding agreements with CIP (the **NIPA**). The fibre reference offer is not a contract between CIP and Chorus. Nor are TCF service descriptions or technical standards.
14. These documents do not meet the definition of a UFB contract and therefore the Minister is precluded from recommending a service description and conditions of service set out in any of these documents where these are materially different from those set out in a UFB contract.
15. The service descriptions and conditions set out in the fibre reference offer, TCF service descriptions and technical standards are far more detailed and prescriptive than those set out in the UFB contracts. While they are (by design) consistent, they are different.
16. We think this is important because Schedule 1AA was included to ensure a smooth transition to the new regulatory framework. Part of that was ensuring the approach to service terms under the UFB contracts continued for Anchor Services and DFAS for at least the first regulatory period (2022-2024).
17. Under the UFB contracts CIP set the high-level parameters for services including price caps and service levels and Chorus was required to establish detailed terms in a reference offer. There is allowance built into the reference offer for the service terms to evolve over time as long as the key terms in the NIPA such as price, availability and service levels are maintained. This is the model the legislation was intended to replicate.

¹ Telecommunications Act 2001, Schedule 1AA, clauses 14(3) and 15(3)

² Ibid, clause 7

³ Deed of Open Access Undertakings for Fibre Services, clause 8; and Deed of Open Access Undertakings for Fibre Services for UFB2, clause 8

Context for regulation

18. Achieving the policy aims of anchor service and DFAS regulation does not require that the regulations include detailed and prescriptive terms through incorporating by reference the fibre reference offer and other documents. The UFB contracts themselves prescribe the maximum price (through the UFB price caps published by CIP)⁴ and non-price terms which were intended to be consistent with that maximum price (including service levels). The statutory purpose is met if the service description, key conditions and maximum price in the first regulations are consistent with those UFB contract terms.
19. Below we describe how the market and regulatory context mean prescriptive regulation is unnecessary, and how the legislative context demonstrates prescriptive regulation was not intended by Parliament.

Market and regulatory context

20. In thinking about what is required to achieve the purpose it is important to consider the other regulation applying to Chorus and the market context in which Chorus operates. The new regulatory framework is incentives-based regulation, so the first question is whether there are incentives which need to be corrected for by prescriptive regulation of service terms.
21. It seems an obvious point, but Chorus' business depends on selling fibre services. Business line restrictions mean we cannot sell services directly to end-users so our business depends on selling services to RSPs. It was to drive this incentive that Chorus was set up as a structurally separate, wholesale only, open access firm.
22. Increasingly, RSPs have choices. Fibre is facing strong competition from unregulated, vertically integrated mobile network operators (**MNOs**) who have a closer relationship with end-users and are using their market position to promote their own products. Our business depends on offering fibre services on terms that are satisfactory to RSPs. For those RSPs that are also MNOs, Chorus' fibre proposition needs to be attractive enough to make them choose our fibre in preference to their own network inputs.
23. Chorus already has strong incentives to offer Anchor Services and DFAS on terms which are attractive to RSPs:
 - 23.1 Anchor Services: Competition from fixed wireless services is particularly acute in the market for 'basic' services. Basic services are the services anchor service regulation is designed to protect. Faced with this threat we take active steps to make our fibre services as attractive as possible to RSPs. In the past we have voluntarily increased the specification of our entry-level fibre product to deliver greater value to consumers.⁵
 - 23.2 DFAS: This service is subject to equivalence of inputs meaning whatever terms we offer RSPs must be reflected in every service in our downstream (layer 2) point-to-point service portfolio. Accordingly, providing unattractive DFAS terms would undermine our entire point-to-point business line. This would impair our ability to achieve our revenue cap.

⁴ <https://www.crowninfrastructure.govt.nz/wp-content/uploads/Chorus-UFB-Price-Caps-1-July-2020-v2.pdf>

⁵ In early 2017 we increased all 30Mbps residential plans to 50Mbps for no extra charge: <https://sp.chorus.co.nz/product-update/free-upgrade-entry-level-fibre-customers>

24. In that context it would make no sense whatsoever for Chorus to try to impose service terms which are unattractive to RSPs. There is no adverse incentive which requires detailed and prescriptive regulation to correct for.
25. Chorus is also subject to other elements of price-quality regulation and information disclosure regulation:
 - 25.1 Price-quality regulation caps the revenue Chorus is able to earn from providing fibre fixed-line access services and sets minimum quality standards we are required to meet. If the Commission believes the Chorus fibre service portfolio and pricing are not meeting the purposes of Part 6, it has the option to move from a revenue cap to price cap regime and introduce further quality standards.
 - 25.2 Information disclosure regulation will provide the Commission with regular, granular information about our service pricing and quality and detailed disclosure of contract terms. There is no realistic prospect that conduct inconsistent with the purposes of Anchor Services or DFAS regulation would go undetected.
26. These would ensure that if Chorus did set unattractive service terms it would be detected and addressed.

Legislative context

27. The Draft Regulations mimic a standard terms determination (**STD**) under Part 2 of the Act by prescribing in great detail all the terms applicable to the services. However, there are several factors in the Act which suggest this approach was not intended.
28. There is a strong similarity in construction between section 66(a) which empowers the Minister to add a telecommunications service to Schedule 1 of the Act, and sections 227 and 228 which empower the Minister to declare a telecommunications service to be an Anchor Service or DFAS. This similarity suggests how services are specified in Schedule 1 of the Act provides a good guide to the level of detail expected in Anchor Service or DFAS regulation.
29. The Anchor Service and DFAS provisions in sections 227 and 228 can be contrasted with the Commission's obligation for STDs in section 300(1) of the Act to specify sufficient terms to allow, without the need for the access seeker to enter into an agreement with the access provider, the service to be made available within the relevant timeframe. Under the UFB contracts Chorus was required to establish these detailed terms in a fibre reference offer – in our view this is the model the legislation was intended to implement.
30. We also note that section 211 of the Act prevents the Commission commencing an investigation under Schedule 3 in relation to fibre fixed line access services. This ultimately prevents a STD under Part 2 for fibre fixed line access services. If Parliament had intended regulation at the level of detail proposed in the Draft Regulations for Anchor Services and DFAS, and required for STDs under section 300(1), it would have employed the existing mechanism for doing so under Part 2 rather than precluding it.
31. If detailed prescription was intended, a Part 2 process would deliver a more practical outcome than implementation of the Draft Regulations. Subpart 2A of Part 2 provides for a detailed process of standard terms proposal by the regulated provider,

consultation, draft determination by the Commission, finalisation and application intended to deliver practical terms. The process is far from perfect and our experience of copper regulation is that the results can be variable. But if detailed and prescriptive terms were intended it would have been preferable to use that process rather than freezing and incorporating existing terms developed under a different framework 'to the extent relevant' and subject to certain changes.

Practical impact

Parallel products

32. Under the Draft Regulations, to buy Anchor Services or DFAS, RSPs would have to enter into a separate contract incorporating precisely those terms required by the regulations. They could not take the services under commercial terms applying to other fibre services.
33. This is likely to result in the stranding of Anchor Services and DFAS and the development of 'parallel products' - commercial services at the price and with the key features of the Anchor Services and DFAS but on the same commercial terms as our other fibre services. Our RSP customers are likely to buy the commercial equivalents as they prefer the simplicity of a single set of commercial terms for all fibre plans and the commercial equivalents can evolve and improve as the current product suite has done.
34. We may not sell any regulated Anchor Services or DFAS at all. We have had this experience with copper STD services such as UBA Backhaul and UCLF where the regulated service was not fit for purpose so RSPs purchase commercial alternatives.
35. However, we would have to maintain the systems and processes necessary to provision and support the Anchor Services at any time. This would lock-in existing systems and processes even where better alternatives are available, preventing improvement or innovation. The costs will flow through to prices paid by consumers for no benefit.

Complexity and compliance

36. The complexity and lack of certainty of the Draft Regulations is such that it would be difficult for us to assess our own compliance. This would give rise to a risk of inadvertent breach of a price-quality requirement with potentially serious legal consequences.
37. Clauses 9,12 and 16 of the Draft Regulations incorporate several reference offer documents, TCF service descriptions and technical standards 'to the extent relevant' to the service descriptions which are themselves incorporated by reference – subject to the changes provided for in Schedule 2 of the Draft Regulations.
38. There are hundreds of pages of documents proposed to be incorporated and Chorus has no reliable way of assessing whether and to what extent any of those provisions are relevant to the service descriptions as modified. This also presents a problem for RSPs in determining what terms they are entitled to, and for the Commerce Commission in attempting to monitor and enforce the regulations.
39. Breach of a price-quality requirement is a serious matter. It carries the potential for significant pecuniary penalties and, in some cases, may be an offence. The

combination of vague and uncertain requirements with serious penalties for failure is a highly undesirable situation and not good regulation. Faced with this prospect, a conservative approach would assume all provisions incorporated by reference are relevant and ensure all are applied to Anchor Service and DFAS provision. Given the volume of documents incorporated, the compliance exercise would be extremely onerous and – if all RSPs are buying parallel products – a deadweight regulatory imposition, ultimately to the detriment of RSPs and consumers.

Terms for 2022

40. We understand that the end of the UFB contracts, and withdrawal of CIP from approving service terms, causes some apprehension for our RSP customers. The regulations do have a role to play in providing comfort on key aspects of Anchor Services and DFAS, but it is our responsibility to make sure RSPs know the terms on which we will provide service are reasonable and consistent with what has developed under CIP oversight.
41. Therefore we have included as **Annex A** to this submission our draft 2022 CSA which are the general terms under which all service specific documentation will sit from 1 January 2022.
42. In November 2020 we began a transition process to move from our existing contractual terms for fibre services to a new 2022 CSA. The key driver was the need to update the existing contract to ensure it is fit for purpose under the new regulatory model.
43. We worked with RSPs to identify priority issues which should also form part of the transition scope. While initially feedback suggested potential improvements to the provisions for change mechanics, end-user relationships, liability, insurance and security arrangements, later engagement suggested a narrower scope of change was preferable in order to ensure transition to a fit for purpose contract by 2022.
44. The draft 2022 CSA attached reflects that narrowed scope. We hosted an all RSP feedback session at the end of March and those RSPs in attendance were broadly supportive of this scope. We will look to address the broader issues identified above once the 2022 CSA is in place.
45. The focus of the changes in the 2022 CSA are:
 - 45.1 essential changes to ensure the 2022 CSA is fit for purpose under the new regulatory regime from 1 January 2022 (i.e. removing references to CIP, NIPA, price caps and dates related to the transition to a new regulatory regime); and
 - 45.2 updating existing references to health and safety, privacy, and contracts legislation to ensure we refer to the most up to date legislation in these areas.
46. The other terms on which we would propose to provide Anchor Services and DFAS are the service descriptions, price list, service level terms and operations manuals set out in our current fibre reference offer.⁶ The Draft Regulations make changes to the Anchor Service and DFAS service descriptions so new service descriptions would be required.

⁶ These are available on the Chorus website here: <https://company.chorus.co.nz/node/523>

47. Although the current versions of the service level terms and operations manuals are noted in the Draft Regulations, their incorporation by reference in regulation freezes them in place meaning further improvements to those documents would not flow through to Anchor Services and DFAS without changes to the regulation. The service level terms and operations manual were updated as recently as October 2020 which demonstrates they do change and are intended to do so where improvements are identified.⁷
48. The 2022 CSA, when finalised, and reference offer documents as updated from time to time, represent the terms on which we would like to continue to provide the Anchor Services and DFAS. We would not be able to do that based on the Draft Regulations which will require bespoke terms for these particular services. We strongly encourage MBIE to revise the approach to the Draft Regulations to permit a more practical outcome. Below we have proposed a way to do this.

Alternative approach to regulations

49. Regulations which comply with the requirements of the Act, achieve the policy aims of Anchor Services and DFAS, and deliver a practical and cost-effective outcome for all stakeholders are possible. We have produced a draft of alternative regulations which achieves this. Our alternative draft regulations are attached as **Annex B**.
50. Our aim is to strike the right balance of certainty for stakeholders vs. flexibility to evolve commercial terms and improve operational systems and processes. Our proposed approach would allow us to include the Anchor Services and DFAS as services available under the 2022 CSA. This means general terms (such as billing, dispute resolution and security deposits), and operational matters (such how to order new services, or log and escalate faults) will be the same across the full suite of Chorus fibre services. It also means if any of these matters are improved (e.g. a new fault management portal) they will improve for all services. We think this is the best outcome for Chorus, RSPs and end-users.
51. Our proposed alternative draft regulations:
- 51.1 Require Chorus to produce a reference offer setting out all the terms on which Anchor Services and DFAS will be made available consistent with the requirements of the UFB contracts.
 - 51.2 Include schedules for each of the Anchor Services and DFAS incorporating descriptions and conditions from the UFB contracts.
 - 51.3 A schedule of service levels drawn from the UFB contracts setting out the key service levels and service credits payable for failures.
52. In this way, using only descriptions and conditions set out in UFB contracts as permitted by the Act, regulations can ensure production of a reference offer with the key parameters of the existing services including price and service levels.

⁷ Even the copper STDs allow for the operations manuals and service level terms to evolve. See e.g. clause 9 of the UBA Service STD General Terms: https://comcom.govt.nz/_data/assets/pdf_file/0032/195467/UBA-standard-terms-determination-General-terms-15-December-2019.pdf

53. Our approach would also provide a far more meaningful compliance standard against which Chorus and the Commission could assess Chorus' compliance. Our draft deals with issues such as:

53.1 treatment of service terms additional to those prescribed in regulations;

53.2 how to approach enforcement of the regulations vs. enforcement of terms of services provided pursuant to regulations; and

53.3 clarifying that the geographic scope of the obligation to provide Anchor Services and DFAS is consistent with the UFB contracts.

54. These are important matters that are not dealt with in the Draft Regulations.

Price caps and CPI adjustment

Price caps from 1 July 2021

55. The Draft Regulations reference price caps which are current as at the date of the draft, but will be replaced on 1 July 2021 in accordance with the mechanism in Schedule 1AA to the Act. Assuming the regulations will not come into force prior to 1 July 2021, it is important regulations reflect the correct price.

56. Schedule 1AA to the Act preserves the services and pricing set out in the UFB contracts during the transition to the new regulatory framework.⁸ It permits Chorus to apply an annual CPI adjustment to price caps on 1 July.⁹ On 19 May 2021 Chorus gave notice to its customers that from 1 October 2021 the price for fibre services would be increasing in accordance with the CPI adjustment mechanism. CIP has confirmed that the associated price caps will change and from 1 July 2021 these price caps are the maximum prices under the UFB contracts.¹⁰

57. The Act provides that the first Anchor Service and DFAS regulations must not prescribe maximum prices that are different from the maximum prices set under a UFB contract immediately before the implementation date.¹¹ Accordingly, regulations coming into force after 1 July 2021 will need to include the following price caps:

57.1 Bitstream 2 Accelerate 100/20 - \$47.87 per month

57.2 Voice service - \$26.02 per month

57.3 DFAS - \$369.41 per month

CPI adjustment

58. The Draft Regulations include a CPI adjustment mechanism which is inconsistent with that set out in Schedule 1AA to the Act. Over the last two years we have adapted to

⁸ Telecommunications Act 2001, Schedule 1AA, clause 9(5)

⁹ Ibid, clause 9(6)

¹⁰ Further detail is set out in our customer communications here: <https://sp.chorus.co.nz/product-update/proposed-ufb-price-changes-reference-cpi-1-october-2021>

¹¹ Telecommunications Act 2001, section 228(6) and Schedule 1AA, clause 14(4)

the statutory 1 July date for CPI adjustments to price caps and we think this should continue.

59. The Act requires that the first Anchor Services and DFAS regulations must not prescribe a maximum price unless that maximum price has an annual CPI adjustment mechanism.¹² As described above, UFB service pricing has been subject to a statutory annual CPI adjustment during the transition period. The statutory mechanism sets a date of 1 July for the CPI adjustment.¹³ It took some effort on the part of Chorus, CIP and RSPs to arrive at practical way of making these adjustments work on the statutory 1 July cycle and we do not think there are good reasons for departing from that cycle for Anchor Services and DFAS only. We are likely to continue with the 1 July cycle for our commercial fibre services and our RSP customers would prefer the Anchor Services and DFAS to be on the same cycle. In 2020 Chorus deferred price changes from 1 July to 1 October in recognition of the COVID 19 pandemic challenges the industry faced.
60. Keeping the date consistent would also obviate the need to include a catch-up adjustment of greater than 12 months change in CPI to move the date to 1 January as prescribed in the Draft Regulations. This is consistent with the principle of a smooth transition to the new regulatory framework which Schedule 1AA was intended to facilitate.
61. Our draft alternative regulations include a CPI adjustment mechanism that continues the approach prescribed in Schedule 1AA. As well as continuing the 1 July cycle, our proposed CPI mechanism ensures RSPs will have sufficient notice of new price caps and facilitates Commission oversight of the calculation.

Relief from double regulation of DFAS

62. Section 230 of the Act allows for regulations to discharge Chorus from its obligation to supply a service under an undertaking given under Part 4AA of the Act. We strongly believe that regulations should discharge Chorus from its obligations to supply DFAS under its Deed of Open Access Undertakings for Fibre Services dated 6 October 2011, and its Deed of Open Access Undertakings for Fibre Services for UFB2 dated 22 June 2017 (together **Fibre Deeds**).
63. In moving to the new regulatory framework it was clear the intention was to replace the old framework with the new one and that new regulations shouldn't be layered on top of old covering the same subject matter. MBIE said in its Departmental Report on the 2018 amendment Bill to the Act:¹⁴

Finally, it was intended that the pre-2020 regime would not apply to services which were regulated under the new Part 6 regime... To add additional safeguards from that regime, on top of the safeguards in the new Part 6, would create an unnecessarily complex regime.

¹² Ibid

¹³ Ibid, clause 9(6)

¹⁴ MBIE, 'Telecommunications (New Regulatory Framework) Amendment Bill – Departmental Report to the Economic Development, Science and Innovation Committee', 20 April 2018, para 82

64. Consistent with that intent, section 230 was included in the Bill to facilitate removal of requirements to provide DFAS under the old regime where requirements to provide DFAS were introduced under the new Part 6.
65. Double regulation of DFAS is problematic because:
- 65.1 The Fibre Deeds are different in scope from regulation under Part 6. The Fibre Deeds apply to services provided over fibre-to-the-premises access networks built under the UFB and UFB2/2+ initiatives respectively. DFAS regulations can apply to fibre fixed-line access services (as defined in the Act) where they are subject to price-quality regulation but the Minister has some discretion to set the scope within that.
- 65.2 The Fibre Deeds have a different purpose from regulations under Part 6:
- 65.2a The purposes of the Fibre Deeds are to promote competition for the benefit of end-users; to facilitate transparency, non-discrimination and equivalence; and to facilitate efficient investment in telecommunications infrastructure and services.¹⁵
- 65.2b DFAS regulations are a component of price-quality regulation under Part 6. The purpose of price-quality regulation is to regulate the price and quality of fibre fixed-line access services.¹⁶ The purpose of Part 6 is to promote the long-term benefit of end-users by promoting outcomes consistent with those in workably competitive markets.¹⁷
- 65.3 These purposes are different. Having similar regulation of the same service for different purposes raises questions about the appropriate approach to the service itself and how Chorus' conduct with respect to DFAS should be assessed.
- 65.4 Maintaining both regulations is likely to expose Chorus to double jeopardy. Given the significant potential overlap in requirements between the Fibre Deeds and DFAS regulations there is a strong likelihood the same conduct could give rise to breaches of both the Fibre Deeds and DFAS regulations (a price-quality requirement under Part 6). It is inconsistent with good regulation for firms to be exposed to double jeopardy in this way. The different purposes would also make it difficult to assess the seriousness of any potential breach in considering enforcement action.
66. We therefore believe it is important to include in DFAS regulations provisions discharging Chorus from its obligations to provide DFAS under the Fibre Deeds. This is necessary to ensure a more coherent regime consistent with principles of good regulation.

¹⁵ Telecommunications Act 2001, section 156AC

¹⁶ Ibid, section 192

¹⁷ Ibid, section 162