

Enhancing telecommunications regulatory and funding frameworks: discussion paper

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Contents

Executive Summary	. 1
Introduction	. 2
The discussion paper policy criteria	. 2
Proposals set out in the paper	. 2
Consumer access to dispute resolution	. 2
Accessing shared property for fibre installations	. 3
Telecommunications development levy settings	. 3
Identifying participants in the market	. 5
Enhancing information flows to the Emergency Location Information System	. 5
Governance settings in 'other' local fibre company constitutions	. 5
Non-regulated fibre networks in specified fibre areas	. 6
Clarifying the pathway between information disclosure and price-quality regulation for regulated fibre providers	6
Application of RSQ codes to wholesale fibre providers	
Attachment: Chorus, LFC and comparison website compliance	10

Executive Summary

Thank you for the opportunity to provide feedback on the Ministry's Enhancing Telecommunications Regulatory and Funding Frameworks discussion paper (**the discussion paper**).

We support most proposals in the paper, including mandatory membership of an approved disputes resolution scheme, preserving current statutory rights for fibre installations, and clarifying the pathway between information disclosure and price quality regulation.

Conversely, we believe some proposals require further consideration. In particular, the Ministry proposes to delegate the existing Parliamentary authority to set the telecommunications development levy (**TDL**) to the Minister, who would be able to increase the TDL by regulation. This would reduce the scrutiny applied to TDL funding proposals and permit potentially significant TDL levy increases to be made without Parliament having the opportunity to properly debate them.

Similarly, the proposal to devolve this levy setting power to the Minister without a proper review of the wider TDL legislative settings misses an important opportunity to update settings that are out of date, unnecessarily unwieldy and costly, and out of step with the Government's own guidelines for setting and implementing levies (which were introduced after the levy was designed).

The Ministry suggests these changes are "lower priority". We respectfully disagree with that characterisation. We are concerned that the Ministry's proposal will embed a levy methodology that is costly to administer and lacks transparency and request that the Ministry consider consequential changes to the Act to bring the levy into line with new Government guidance on levy design and the approach taken in the energy sector to the Electricity Industry Levy.

Introduction

- Thank you for the opportunity to provide feedback on the Ministry's Enhancing Telecommunications Regulatory and Funding Frameworks discussion paper (the discussion paper).
- 2. The Ministry has identified a range of issues across the consumer protection, telecommunications development levy and regulatory frameworks.

The discussion paper policy criteria

- 3. The Ministry propose to apply several criteria to deciding whether to amend the Act, including consistency with the existing regulatory regime, promotion of competition, consumer protection, fair and transparent regulatory design, and incentivising innovation and further investment in telecommunications.
- 4. We agree that the Ministry should ensure that proposed amendments are consistent with the current regulatory framework and demonstrably promote the original policy concern. Further, any changes should be proportionate (as noted in the paper), seek to address a specific market failure or policy concern and any benefits outweigh the costs of further regulation.

Proposals set out in the paper

Consumer access to dispute resolution

- 5. The Ministry has concerns that not all telecommunications service providers are members of an industry dispute resolution scheme. Telecommunications providers are not required to be members of a disputes resolution scheme and consumers may not be aware of, or have access to, free and impartial dispute resolution services.
- 6. We agree that it should be mandatory for anyone offering wholesale or retail telecommunications services to join an approved disputes resolution service, including customers of satellite and regional providers. While TDR is currently the only approved telecommunications dispute resolution scheme provider, the regulatory framework provides that there can be others.
- 7. However, while the discussion paper focuses on retail providers, we suggest the Ministry also consider extending mandatory scheme membership to wholesale providers as well as retail providers. Wholesale providers contribute to a significant proportion of disputes. The TDR reports¹ that over the past 6 months around 25% of complaints relate to matters i.e., faults, installation and network performance the wholesale service is likely a contributing factor.
- 8. Membership of the TDR service is a requirement of TCF membership and accordingly TCF member wholesalers are members of the TDR scheme. The TDRS reports that the ability to accept complaints from consumers regarding wholesale members directly removes unnecessary delays with achieving resolution.² The TDRS is also able to investigate and report on potential systemic concerns. Extending mandatory dispute resolution scheme membership to all retail and wholesale providers ensures these protections and benefits are available to all end-users.
- 9. Further, we operate in a diverse and complex market that includes, for example, price comparison websites. Price comparison websites promote themselves as independent parties providing an unbiased view of retail service provider options for consumers. But their economic model is reliant on commercial arrangements with a small subset of those retail and wholesale service providers, which may not be clear to all customers. Consumers should have the ability to refer concerns

¹ TDR half year report <u>TDR Half-Year Report – 2023 | Telecommunications Dispute Resolution</u>

² TDR half year report <u>TDR Half-Year Report – 2023 | Telecommunications Dispute Resolution</u>

relating to sales made through comparison websites in the same way as if the sale had been made directly with the telecommunications service provider.

10. Accordingly, we recommend that the Ministry respond to a dynamic market by providing that telecommunications providers and entities engaged in the provision of telecommunications services to end-users be required to join a dispute resolution scheme, including price comparison websites which promote retail service and provide a channel to end users.

Accessing shared property for fibre installations

- 11. The Ministry is considering:
 - a. Extending current statutory rights for fibre installations which are due to expire.
 - b. Adding high impact installations to the scheme, and
 - c. Allowing the rights to be used without a retail connection order from an internet service provider.
- 12. We support the first two of these proposals to avoid delays to fibre connections and to improve the customer service experience.
- 13. We further support Chorus and LFCs working with developers and landlords to deploy connections in new builds or subdivisions in anticipation of service orders when the inhabitants move in. However, in brownfields situations we believe the deployment of fibre infrastructure should only be undertaken with the prior approval of the premises' owner and should be undertaken to the same quality it would have been done if an RSP had been involved.

Telecommunications development levy settings

- 14. The Ministry is also considering options to:
 - a. Expand the scope of liable parties to capture, for example, satellite providers who provide services to New Zealanders and future use case, and
 - b. Devolve responsibility for the setting the total amount of the levy to the Minister via regulation (rather than via an amendment to the Act) without also considering related levy legislative settings that add cost and complexity of the levy for service providers.
- 15. We support initiatives to broaden the application of the levy burden to all parties who benefit from expanded coverage, including connectivity providers, Government entities and firms who benefit from expanded network.
- 16. However, we have significant concerns with the proposal to devolve levy-setting powers to the Minister in the absence of a principled review of related legislative levy settings.
- 17. In our view the current levy approach is costly to administer, out of date, and lacks transparency:
 - a. Similar to other liable parties, we devote material staff time to preparing returns which require an assessment of segment revenue - and have these returns audited. The Commission must then review and validate these returns.
 - b. The levy is further calculated retrospectively and falls on providers differently (the actual incidence is based on industry revenue share net of payments to other TDL-liable parties rather than on a simple revenue basis), making it difficult to communicate to customers and resulting in it applying differentially across different service provider's customers.

- c. Further, the current methodology appears inconsistent with Government guidance. The Auditor-General's levy guidelines³ note that levies can apply when the goods or services provide a direct benefit to an individual or group of individuals (and not the population as a whole) and that any levy should also be equitable, efficient, justified, and transparent enough to provide accountability. Treasury Levy Guidelines⁴ likewise note that levies are relevant to individuals or individual organisations who directly receive or benefit from the service and should be consistent with a range of effectiveness, efficiency and equity concerns.
- 18. The TDL settings were created long ago some are over 20 years old for a different purpose to the one they are now applied to, and before clear Government guidance on levy design and implementation settings was prepared. We have found numerous examples of where existing TDL settings fail to meet this guidance. They are no longer fit for purpose and should be reviewed.
- 19. The Ministry identifies that the current process for increasing the levy is administratively complex and time-consuming. We would observe that there are good arguments for why a process enforcing full Parliamentary oversight of any proposal to make significant increases to large levies that effectively add to the tax burden on a large majority of New Zealanders.
- 20. But if the logic for this proposed change is to address one example of administrative complexity we consider it appropriate to also consider other, related, administrative complexities and costs created by other levy provisions in the Act at the same time.
- 21. If the Ministry proposes to review how the levy is set, it should also consider how to improve the current levy approach, including addressing our administrative and transparency concerns set out above. For example, the Ministry could consider how the Electricity Industry Levy is applied, and whether that approach would also be appropriate for the telecommunications levy. The Electricity Industry Levy is a modern levy that meets Government guidance on levy design and implementation and sets a transparent levy rate per connection which is transparent to customers and shared equitably across all. This is an approach that providers greater certainty and transparency.
- 22. The Ministry should also consider whether the Act provides sufficient guidance for the setting of, and use of the levy in the proposed flexible approach. For example:
 - a. Ensuring potential projects are consistent with the Part 3 and s90 levy purposes. For example, the levy is not a discretionary fund (which would be better considered a tax) and can only be applied to specific purposes, i.e., to fund rural telecommunications infrastructure or facilitate the supply of services where the services may not otherwise be supplied on a commercial basis or at an affordable price, and
 - b. Ensuring any new unspecified levy can only apply in a way consistent with the Government and Auditor-General guidelines and principles. For example, to fund goods or services that provide a direct benefit to a group of individuals and has clear benefits. An unbounded discretion would add further uncertainty to the sector.
- 23. At this stage, the specific additional purposes to which the proposed additional funding is to be applied is unclear. The discussion paper suggests the levy may be used to fund services that are already offered, but not at an affordable price, and Chorus has suggested the levy could be used to fund expansion of the fibre network. However, these possible initiatives which risk duplicating existing services or seek to address digital equity concerns are unlikely to be consistent with how the levy has been applied in the past and defined levy purposes.

³ https://oag.parliament.nz/2021/fees-and-levies/docs/fees-and-levies.pdf

⁴ https://www.treasury.govt.nz/sites/default/files/2017-04/settingcharges-apr17.pdf

Identifying participants in the market

- 24. The Ministry is considering mandatory registration of telecommunications market participants for Commerce Commission monitoring and compliance purposes.
- 25. We support the Ministry considering the proposal further to a "business case" stage, scoping out the costs of the scheme and how it might apply in practice. We will likely require a supporting registration framework for administrative and compliance purposes with an increasingly complex retail regulatory environment and compliance costs. Nonetheless, at this stage it is unclear what the costs of the scheme, the countervailing Commission cost savings and compliance benefits might be.
- 26. A registration scheme may also help providers meet their other industry obligations. For example, we have several issues with customer transfers when new entrant providers are not set up ahead of time. We have an automated system to ensure customers are quickly and efficiently transferred between providers and to avoid delay providers must be set up ahead of time. In some cases, we rely on wholesale fibre providers to help identify who the alternative provider is. A retailer register, with change notifications, would facilitate this process.

Enhancing information flows to the Emergency Location Information System

- 27. The Ministry also proposes to amend the Act to regulate the provision of emergency location information to Ministry for its emergency location information system.
- 28. It's unclear what the costs and benefits of such an approach would be without further information relating to the scope, cost and complexity of future enhancements. As noted in the discussion paper, the current contractual arrangements with mobile network operators and agencies are generally working well. Further, as far as we are aware, providers have engaged productively with agencies to deploy the necessary capability, which is based on international standards with a clear funding model.
- 29. We believe the current approach that anticipates the Privacy Commission, telecommunications providers and agencies working together on enhancements with explicit funding and a statement of work approach has been successful and will be difficult to replicate in a regulated model.
- 30. Further, if the Ministry wishes to pursue this initiative further, it should consult further on protections that ensure proposals are consistent with privacy obligations, lowest cost, pass a cost/benefit test and are practical for all parties.

Governance settings in 'other' local fibre company constitutions

- 31. The Ministry proposes to allow LFCs to operate in other markets, or deliver any other service, provided it is not a retail telecommunications service and considering amending the Act so that the Commission may give dispensation for LFCs to offer layer 3 and 4 services. The layer 3 and 4 restriction is currently in LFC constitutions and can currently be changed with MBIE and CIP agreement.
- 32. There are ongoing retailer concerns that wholesale providers and Chorus in particular continue to expand into retail markets. While Chorus and LFCs are prevented from retailing to end users, we see wholesale fibre providers expanding into adjacent markets, marketing directly to end users, and pricing and connection incentive structures that shape retail markets⁵. Chorus proposes to spend⁶ over \$160m through the next regulatory on retail related activities.

 ⁵ Chorus offers a two-tier pricing structure for entry level fibre services (lower if an RSP retails below a certain price) and structured payments to RSPs to connect customers that shape retail markets.
⁶ \$115.3m on product, sales and marketing and \$47.0m for customer connection incentives.

- 33. We agree that the split between wholesale and retail fibre services is a fundamental aspect of the Act, and proposals that enable LFCs to further undertake retailer activities (albeit consistent with line of business restrictions and short of supplying directly to end-users) can only reduce retail innovation and competition.
- 34. The Chorus line of business restrictions at Part 2A of the Act provide that Chorus may not participate in the supply of telecommunications services to end users, may not participate in services above layer 2 nor provide end to end services. These are all key elements of the framework that maintains the wholesale and retail split.
- 35. Therefore, if the Ministry decides to remove restrictions set out in LFC constitutions, it should ensure that it maintains comparable LFC restrictions to those set out in the Act, i.e., a prohibition of services above layer 2 and the provision of end-to-end services.

Non-regulated fibre networks in specified fibre areas

- 36. The Ministry is considering amending the Act so that the Commerce Commission may consider non-regulated fibre service provider networks in determining specified fibre areas. Chorus may retire the copper network (subject to the Copper Withdrawal Code) and TSO obligations removed in specified fibre networks. As predominantly urban UFB areas are already specified fibre areas, the proposal would likely apply to rural fibre initiatives.
- 37. We agree that regulated copper and TSO obligations make little sense when there is alternative, better performing options for customers. Accordingly, we agree that the Commission should consider reasonable consumer alternatives when determining specified fibre areas (considering all connection costs such as lead-ins, which can be substantial).
- 38. However, we do not support amending the framework in isolation from a more general review that considers all technology options, and the findings of the Commission copper services and any TSO reviews. The Commission is considering the degree to which there are reasonable consumer alternatives to rural copper services, and this should inform the Ministry's revised approach. The Ministry may need to consider its approach further, for example, where a small lines company has a fibre network but the services are not sold by any major retailer.

Clarifying the pathway between information disclosure and price-quality regulation for regulated fibre providers

- 39. The Ministry proposes to clarify that the Commission can recommend both regulation and deregulation following a s226 review.
- 40. We agree that the Commission should be able to recommend the next step of LFC price-quality regulation and while we understand that this is currently permitted support clarifying the original policy intent.

Application of RSQ codes to wholesale fibre providers

- 41. We recommend that the Ministry also consider the current scope of the Retail Service Quality Framework.
- 42. The Commission is currently consulting with providers on a range of product disclosure obligations, including obligations relating to the availability and performance of services to end user customers. The objective of these proposed obligations is to ensure that consumers are provided accurate, up-to-date and consistent information about the services they buy.
- 43. However, it has become apparent that there is an emerging gap in the framework relating to:
 - a. Wholesale providers' RSQ obligations when engaging with end users, and

- b. The flow-through of RSP obligations to third-party comparison websites.
- 44. LFCs communicate and engage directly with end-users on a regular basis, including direct marketing of the benefits of fibre retail services. However, based on the current drafting of the Telecommunications Act, the Commission considers it cannot impose binding RSQ obligations on LFCs including in relation to direct marketing of telecommunications services. Our view is that this results in a regulatory loophole that overlooks activities (including marketing) that are directed at consumers and that we consider should be subject to regulation, but aren't simply because the marketer is a wholesaler of telecommunications services rather than a retailer.

LFC direct communications to end-customers

- 45. LFCs have significant communication budgets that they use to promote fibre services directly to consumers and to advise end-user customers of their options when retiring legacy networks. We believe that the gap between broader industry guidelines and compulsory Code obligations which apply only to RSPs undermines the Commission's ability to ensure positive outcomes for consumers, as well as the RSQ regulatory framework itself.
- 46. The Commission considered the issue in December 2021, concluding that s 237 of the Act contemplated only retailers (and not wholesalers) being subject to a Commission RSQ code. This reflects the policy that Commission RSQ codes are designed to regulate the provision of retail services, not upstream wholesale services.
- 47. We appreciate the policy objective of avoiding double regulation of activities, and that it was always intended that wholesale services be regulated through Part 6 of the Act. However, in our view, LFCs are marketing fibre services to consumers in ways that are confusing, undermine the objectives of the RSQ regulatory framework and result in poorer outcomes for consumers. For example, Chorus and partner consumer comparison websites do not include many of the Commission draft guideline and TCF code protections (see attachment):
 - a. Chorus makes comparisons between fibre and other technologies without adequate information relating to the comparable technologies and consumer needs, assuming customer demand and service performance.
 - b. Chorus' direct marketing and website (via the embedded Broadband Compare partner site) does not disclose several key factors, such as: the nature of the commercial arrangements with website providers; required information relating to expected service performance; the basis for the quoted bundle price; or making it clear that a wider range of technology options may be available to customers.
 - c. Chorus advertising on sites such as realestate.co.nz does not disclose key information, such as that other technology options may be available, or the bundled nature of the quoted prices, and
 - d. Broadband Compare uses a rating system to prioritise results. However, the rating system lacks transparency and as no customer usage or persona information is disclosed the recommendation cannot relate to the end user needs.
- 48. We believe the Chorus and Broadband Compare partner approach is inconsistent with the outcomes the Commission promotes through its marketing guidelines, and with TCF consumer Codes developed in consultation with the Commission. Retailers who are following Commission guidelines and industry consumer codes could not market services in the same way as Chorus and its partner websites do.
- 49. In our view, the Commission should have flexibility to make an RSQ code that applies across all providers of information to end users.

Comparison websites and third-party providers

- 50. Further, while telecommunications providers are subject to binding obligations, these obligations do not flow through to third party partners. Consumers increasingly rely on comparison websites and third-party agents which are perceived to be 'independent' and 'whole of market'. In turn, Chorus, LFCs and many RSPs have commercial arrangements with comparison websites and sales contractors to promote their services, including a commission on customer acquisitions.
- 51. However, it appears that RSPs using third party channels are not required to comply with existing or proposed regulation. A retailer should not be able to avoid guidelines by using a third party to market their products to consumers. Where an RSP uses a comparison website or door to door contractor to promote services, the RSP should ensure these channels also comply.
- 52. The ACCC⁷ Chair noted in March 2024 that the ACCC would be looking closely at price comparison websites this year. The ACCC is concerned that, while comparison websites can be an important mechanism to inform consumers about price and suitability of products and services, they can also mislead consumers, and not convey the extent of sponsorship and commercial incentives received from suppliers who are featured in the tools.
- 53. The current ACCC focus follows 2015 guidelines⁸ that sought to address transparency issues relating to the material on the operators' websites and behind-the-scenes commercial relationships. The ACCC noted that all operators and suppliers in the comparator website industry have a legal obligation not to engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
- 54. We believe that the gaps in the RSQ framework undermine the effectiveness and credibility of the Commission's RSQ approach. The Ministry could address this through an amendment to s 237 to include the ability for the Commission to impose binding obligations on service providers that communicate or otherwise engage with end users of telecommunication services, and of their partner sites and channels. This would extend a Code's reach to LFCs to the extent that they communicate or otherwise engage with end users. The Ministry could also clarify that telecommunications service providers must ensure compliance when contracting with third parties. For example:

237 Contents of Commission retail service quality code

- (1) A Commission RSQ code must—
 - (a) specify which telecommunications services it applies to; and
 - (b) specify which telecommunications service providers it applies to; and
 - (c) promote the purpose set out in section 233.
- (2) A Commission retail service quality code may-
 - (a) impose binding obligations on telecommunications service providers that provide retail telecommunications services covered by the code;
 - (b) impose binding obligations on telecommunications service providers that communicate or otherwise engage with end users of retail telecommunications services covered by the code; and
 - (c) contain any other provisions that are necessary or desirable.

For the avoidance of doubt, telecommunications service providers should ensure that arrangements with third parties to communicate or otherwise engage with end users of retail telecommunications services provide for these third parties to comply with binding obligations.

 ⁷ Ms Gina Cass-Gottlieb, Chair, at the Committee for Economic Development of Australia (CEDA), Thursday 7 March 2024 on the ACCC '2024-25 Compliance and Enforcement Priorities'
<u>https://www.accc.gov.au/system/files/CSBS%20-%20Comparator%20web%20sites%20project%20-%20Industry%20Guidance%20-%20final.pdf</u>

[End]

9

Attachment: Chorus, LFC and comparison website compliance

Example 1: Chorus direct marketing (DM) to households

Chorus has a partnership with Broadband Compare to promote fibre broadband and provide a fibre specific comparison website. The Chorus URL (Spark highlighting) links directly to a fibre specific Broadband Compare comparison website.

The Chorus DM does not disclose, for example, information relating to the nature of the bundle to which the advertised price applies, the comparison technology subject to freeze face or specific information relating to the nature of the fibre plan.

Direct marketing



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Nested Chorus website

The Chorus nested partner Broadband Compare website does not disclose, for example, information relating to the bundle price, source of the speed claims (average, source of claim, factors impacting achieved speed and availability limitations), advice that other technologies may be available, the effective price of the service or commercial relationships (Chorus and RSP commercial relationships, information relating to how plans are prioritised).



Example 2: Chorus advertising on realestate.co.nz website

Chorus advertising does not disclose that there are other technology options available at the site or where quoted prices are based on bundles.

Great news! It appears this address has a fibre box (ONT) installed, so connecting to fibre should be easy. Find out how to get fibre sorted before you move house.	
nore should be easy. This out now to get hore sorted before you more house.	Learn more
	Not available
	perfibre Hyperfibre 4000 8000
Installed Installed Installed ONTupgrade ON	Tupgrade Hyperfibre
	8000 currently is
	00/4000 not available
mbps mbps mbps mbps	mbps at this address
from from from from \$50 \$65 \$80 \$99	from from \$149 \$280
	ar month per month
Wanting to order fibre broadband before you move house?	
Head to broadbandcompare.co.nz to view fibre broadband options available at this	Learn more
address and get connected before you move.	L

Example 3: Broadband Compare comparison website

Broadband Compare uses a rating system to prioritise results. The rating system lacks transparency and – as no customer usage or persona information is provided – cannot relate to the end user needs or confidently be the best plan for the customer. Claimed speed is not consistent with TCF code and bundle disclosure requirements. Effective monthly price over the contract period is not disclosed. Sponsored links or commercial arrangements are not disclosed on the presentation page.

