# Submission on exposure draft of regulations to be made under section 226 of the Telecommunications Act 2001

3 July 2019

# INTRODUCTION

1 This submission responds to the Ministry of Business, Innovation and Employment's (MBIE) request for submissions on the exposure draft of regulations to be made under section 226 of the Telecommunications Act (paper).

2 The Ultra-Fast Broadband (UFB) initiative is a public private partnership and policy initiative that recognises fibre represents the best, future-proof technology for enabling connectivity and supporting economic and social wellbeing for New Zealanders. The UFB roll-out is currently managed under contractual arrangements between fibre service providers and Crown Infrastructure Partners, where Chorus is providing the majority of the nation-wide roll-out, and other Local Fibre Companies (other LFCs) are providing UFB in specific regions.

3 The Telecommunications Act 2001 (Act) as amended transitions the fibre fixed-line access services (FFLAS) to a utility style model. As discussed in the paper, Part 6 of the Act introduces a new regulatory framework that:

> *"...aims to provide a stable and predictable regulatory environment to further encourage network investment and innovation, prevent excessive profits arising from monopoly services and more generally ensure that consumers have access to quality services at affordable prices".*[1]

4 Under this model Chorus and other LFCs may be subject to regulation on the basis of limited competition to fibre, where:

4.1 Information disclosure regulation (IDR) requires fibre service providers to disclose information that will allow the Commission to determine if the purpose of Part 6 is being met; and

4.2 Price-quality regulation (PQR) requires the Commission to set maximum prices and / or revenues a fibre service provider is allowed to earn from its regulated fibre network, and the quality of service it must provide.

5 MBIE proposes that both these regulations apply to all of Chorus' FFLAS

6 We recommend that the regulations should only apply to Chorus' FFLAS outside areas where other LFCs are contracted to deploy their UFB networks. We consider that the distortionary and quite unusual regulatory implications need careful consideration in terms of good policy and practice. We set out our reasons below.

[1] MBIE consultation paper, *Exposure draft of regulations to be made under section 226 of the Telecommunications Act – Request for submissions,* dated June 2019, p 7

## APPLICATION OF THE S226 REGULATIONS

7 MBIE proposes to apply both IDR and PQR to all of Chorus' FFLAS, and only IDR to all other LFCs' FFLAS. The proposal would mean that in other LFC areas, the LFC (as the UFB provider with a stronger position in the market) is not subject to PQR, or price caps for anchor services or the Direct Fibre Access Service[2], or geographically consistent pricing. However, any non UFB Chorus' competing FFLAS would be subject to that more prescriptive regulation. Additionally, any other competing networks also present would not be regulated.

8 Furthermore, as per the Commerce Commission's (Commission) recently stated position on Chorus' copper services[3], which we do not agree with, Chorus' copper services will continue to remain subject to copper price regulation in LFC areas until the Commission declares the area to be a Specified Fibre Area (SFA) and Chorus complies with the Copper Withdrawal Code.

9 Under the current proposals across MBIE and the Commission, regulation would be applying to UFB FFLAS for LFCs, FFLAS for Chorus and copper for Chorus. Chorus (the non UFB supplier) will be subject to significantly more regulation than the LFC (the UFB contracted supplier), including price caps for both copper and certain fibre services. This position is not the policy intent nor is it good regulatory practice.

10 In practice, under the MBIE proposal any FFLAS investment Chorus may wish to undertake in other LFC areas will be subject to the Commission's input methodologies which includes setting our expenditure allowance and required levels of service quality. This involves layers of scrutiny and disclosure, and will put the Commission in the position of micro managing competition choices. This level of regulatory oversight is neither appropriate nor proportionate, where the supplier with market power is not subject to the same oversight. Disproportionate regulation could lead to suboptimal customer outcomes.

11 In addition, given that the PQR regime is designed around limited competition for fibre to the home services and transitioning UFB to utility regulatory models, the application of the regime beyond that will produce unintended consequences and increase complexity, cost and uncertainty as we work through the regime design and implementation.

12 We recommend MBIE amend its proposal to regulate "all FFLAS" as drafted under regulation 5 of its exposure draft. A principled and proportionate approach is to exclude regulation in areas where there is another LFC and therefore, competing FFLAS. The regulation is clearly directed at LFC FFLAS in those areas.

13 We have proposed draft amendments to MBIE's exposure draft to this effect. We note that the areas where UFB networks are deployed can be easily established as a matter

[2] Under section 227 and 228 of the Act, Chorus will be required to provide price-capped Anchor and DFAS services if it is subject to price-quality regulation in these areas.

[3] See the Commission's, *Email to industry – Update on Specified Fibre Areas – 17 June 2019*

of fact, and we expect this information is likely to form the basis of the Commission's determinations of SFAs. In practice, this means:

13.1 IDR and PQR will apply to FFLAS provided by Chorus outside of other LFC areas; and

13.2 IDR will apply to FFLAS provided by other LFCs outside Chorus UFB areas.