

# **Standard Terms Determination for Chorus’ Unbundled Bitstream Access Service**

## **UBA General Terms**

**Date of determination:** 13 December 2007

Updated to incorporate Commerce Commission decisions, amendments, and clarifications through to 15 December 2019

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## General Information

This document:

- is part of the standard terms determination made by the Commission under section 30M of the Act in relation to Chorus' unbundled bitstream access service; and
- sets out the terms on which Chorus must make its unbundled bitstream access service available to Access Seekers.

## Structure of the UBA Terms

These UBA Terms are made up of:

- **UBA General Terms**

*Sets out the general rights and obligations of Chorus and Access Seekers for Chorus' unbundled bitstream access service.*

- **Schedules to the UBA General Terms**

- Schedule 1     **UBA Service Description**

*Describes the service that Chorus must make available to Access Seekers under the standard terms determination.*

- Schedule 2     **UBA Price List**

*Lists the charges for all of the services that Chorus will make available to Access Seekers under the standard terms determination.*

- Schedule 3     **UBA Service Level Terms**

*Specifies performance levels regarding some of the services that Chorus will make available to Access Seekers under the standard terms determination.*

- Schedule 4     **UBA Operations Manual**

*Sets out in detail the operational procedures for supplying all of the services that Chorus will make available to Access Seekers under the standard terms determination.*

These UBA Terms, including up to date versions of those parts of the terms which may be changed, are available from the Commission ([www.comcom.govt.nz](http://www.comcom.govt.nz)) and a Chorus publicly accessible website.<sup>1</sup>

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<sup>1</sup> Decision No 636 (11 April 2008)<sup>3</sup>.

## 1. Definitions

### 1.1 Except where expressly provided otherwise:

<b>Access Date</b>	has the meaning given in clause 4.2.
<b>Access Seeker</b>	means an access seeker under the Act that has made a Request.
<b>Access Seeker Equipment</b>	means any equipment of the Access Seeker in a Chorus exchange pursuant to the UBA Terms.
<b>Access Seeker's Network</b>	means the telecommunication system whether fixed, mobile or wireless from time to time of the Access Seeker which the Access Seeker uses to provide services including all transmission media, equipment and related support systems but excluding anything on Chorus' side of the Handover Point between the Access Seeker's Network and Chorus' Network. For the purposes of this definition, Access Seeker includes every Related Company of the Access Seeker.
<b>Act</b>	means the Telecommunications Act 2001.
<b>Bank</b>	means any body registered as a registered bank under section 69 of the Reserve Bank of New Zealand Act 1989.
<b>Bill Rate</b>	means the average 90 day bank bill mid rate as quoted on Reuters Screen page BKBM or the equivalent page replacing page BKBM (known at the date of these terms as the FRA rate) at or about 10.45 am on the relevant date or, if at that time page BKBM or the equivalent replacement page is not available, the last rate quoted on that page before it became unavailable.
<b>Charge or Charges</b>	means all or (as the context requires) any amounts payable by the Access Seeker under the UBA Terms.
<b>Chorus</b>	has the meaning given in s69B of the Act.
<b>Chorus Owned Equipment</b>	means any Chorus owned, leased or licensed equipment provided to the Access Seeker by Chorus for use as part of the UBA Service.
<b>Chorus' Network</b>	means the telecommunication system (whether fixed, mobile or wireless) which Chorus uses to provide services including all transmission media, equipment and related support systems but excluding Chorus Owned Equipment or anything on the Access Seeker's side of the Demarcation Point between Chorus' Network and the Access Seeker's Network. For the purposes of this definition, Chorus includes every Related Company of Chorus.
<b>Chorus' Systems</b>	means any operational and business support systems, including those used by Chorus, for the ordering, supply, provisioning and fault maintenance of services, whether or not owned or controlled by Chorus, including OO&T and OFM, and any functionalities of such systems, that are provided to the Access Seeker under the UBA Terms.

<b>Commission</b>	means the Commerce Commission in the course of performing its functions under the Act.
<b>Customer</b>	means: <ul style="list-style-type: none"> <li>(a) in relation to the Access Seeker, a person who has a contractual relationship with the Access Seeker for the supply of services, the provision of which relies in whole or in part on the UBA Service; and</li> <li>(b) in relation to Chorus, means an Other Service Provider who has a contractual relationship with Chorus for the supply of services or to whom Chorus is supplying services pursuant to any law or regulation.</li> </ul>
<b>Deadlock</b>	has the meaning given in clause 37.4.
<b>Default</b>	means any failure or refusal or inability by either the Access Seeker or Chorus to meet any of its obligations under the UBA Terms.
<b>Default Notice</b>	has the meaning given in clause 34.1.
<b>Dispute</b>	has the meaning given in clause 37.1.
<b>Dispute Notice</b>	has the meaning given in clause 37.2.
<b>End User</b>	means a person who is the ultimate recipient of the UBA Service (or of another service the provision of which relies in whole or in part on the UBA Service).
<b>Exchange</b>	means a Chorus owned or leased building, or leased or licensed area within a building, with a floor area of at least 15 square metres and a main distribution frame terminating copper local loop of at least 200 pairs connected to End-User premises, the primary function of which is to provide fixed wire line telecommunications services, and includes all of the Chorus owned, leased or licensed property on which the building is situated.
<b>Exchange Entry Point</b>	means any point reasonably specified by Chorus for entry of Access Seeker's Tie Cables into a Exchange, including from the Exchange Manhole into the Exchange using the Exchange access ducts, and any other entry point agreed between Chorus and an Access Seeker.
<b>Exchange Manhole</b>	means the congregation point for all ducts and cables that enter the Exchange that is reasonably specified by Chorus, most commonly a manhole on the property on which the Exchange is located.
<b>Force Majeure Event</b>	has the meaning given in clause 20 of the General Terms.
<b>Handover Point</b>	means the handover point described in the UBA Service Description.
<b>Implementation Plan</b>	means the implementation plan that forms part of the UBA Standard Terms Determination

<b>Indirect Damages</b>	means any liability resulting from or arising under or in connection with the UBA Terms (whether based in contract, tort, statute or otherwise) for:  (a) indirect, incidental or consequential economic loss or damage; or  (b) loss of profit, loss of revenue, loss of production, loss of income, loss of business, loss of anticipated savings, loss of entitlement to special damages and loss of opportunity.
<b>Intellectual Property</b>	means any patent, copyright, design, trade name, trademark, service mark or other intellectual property right (whether registered or not) including ideas, concepts, know-how, techniques, designs, specifications, drawings, blueprints, tracings, diagrams, models and other information relating to any such intellectual property.
<b>Interference Management Plan</b>	means the plan set out in schedule 5 to the document 'UCLF Terms' that is part of the standard terms determination made by the Commission under section 30M of the Act in relation to Chorus' unbundled copper low frequency network service.
<b>Network</b>	means, as the context requires, Chorus' Network or Access Seeker's Network.
<b>New UBA Variant</b>	means a digital subscriber line enabled service as described in the description of service for Chorus' unbundled bitstream access service in Subpart 1 of Part 2 of Schedule 1 of the Act and that is not described in the UBA Service Description. <sup>2</sup>
<b>Notice</b>	means a notice in writing provided in accordance with section 44.
<b>Non-Payment Notice</b>	has the meaning given in clause 15.1
<b>OFM</b>	means any Online Faults Management system as used by Chorus and Access Seekers, as updated from time to time.
<b>OO&amp;T</b>	means any Online Ordering and Tracking system as used by Chorus and Access Seekers, as and updated from time to time.
<b>Other Service Provider</b>	means a provider of telecommunications services other than the Access Seeker or Chorus.
<b>Party</b>	means (as the context requires) Chorus or the Access Seeker and Parties means both Chorus and the Access Seeker.
<b>Performance Penalty</b>	has the meaning given in the UBA Service Level Terms
<b>Planned Outage</b>	has the meaning given in clause 21.2.
<b>Related Company</b>	has the meaning set out in section 2(3) of the Companies Act 1993.

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<sup>2</sup> Decision No <sup>636</sup> (11 April 2008)



<b>Reported Fault</b>	has the meaning given in clause 24.1.
<b>Request</b>	means a request in writing pursuant to section 30S(1) of the Act which Chorus receives from an Access Seeker to make the UBA Service available on the UBA Terms.
<b>Suspend and Suspension</b>	includes: <ul style="list-style-type: none"> <li>(a) to restrict or otherwise withdraw the right to use the UBA Service or any part of the UBA Service; and</li> <li>(b) to refuse any order for the UBA Service.</li> </ul>
<b>Telecommunications Carriers' Forum</b>	means the New Zealand Telecommunications Carriers' Forum or its successor body.
<b>Tie Cable</b>	means a tie cable running from the MDF in the relevant Exchange to a point outside and adjacent to the Exchange Entry Point.
<b>UBA General Terms</b>	means the terms set out in this document excluding its schedules.
<b>UBA Operations Manual</b>	means the manual set out in schedule 4.
<b>UBA Price List</b>	means the list set out in schedule 2.
<b>UBA Service</b>	means Chorus' unbundled bitstream access service as described in the UBA Service Description or (as the context requires) any part of that service.
<b>UBA Service Description</b>	means the description set out in schedule 1.
<b>UBA Service Level Terms</b>	means the terms as set out in schedule 3.
<b>UBA Standard Terms Determination</b>	means the standard terms determination made by the Commission under section 30M of the Act in relation to Chorus' unbundled bitstream access service, including the Commission's decision report, the Implementation Plan and the UBA Terms.
<b>UBA Terms</b>	means, together, the UBA General Terms and the schedules to the UBA General Terms as described in the first page of these UBA General Terms.
<b>UCLF General Terms</b>	means the terms set out in the UCLF Standard Terms Determination for Chorus' Unbundled Copper Low Frequency Service dated 24 November 2011 and updated from time to time.
<b>UCLF Service</b>	means the unbundled copper low frequency service supplied by Chorus pursuant to the standard terms determination made by the Commission under s74 of the Telecommunications (TSO, Broadband, and Other Matters) Amendment Act 2011.

<b>UCLF Terms</b>	means, together, the UCLF General Terms and the schedules to the UCLF General Terms as described in the first page of these UCLF General Terms.
<b>Unplanned Outage</b>	has the meaning given in clause 21.4
<b>Working Day</b>	means any day other than a Saturday, Sunday or public holiday in any province relevant to the provision of the UBA Service.

## **2. Guiding Principles**

- 2.1 The UBA Standard Terms Determination is designed to meet the purposes set out in the Act, and in particular, section 18 of the Act. The UBA Terms, as amended from time to time, are to be interpreted in light of Commission relevant decision reports, section 18 of the Act and the amendments made in the 2018 amendments to the Act.
- 2.2 The Parties must:
- 2.2.1 carry out their obligations under the UBA Terms in good faith and in furtherance of those purposes; and
  - 2.2.2 ensure that they and their employees, subcontractors and agents do all things reasonably necessary, including executing any additional documents or instruments, to give full effect to the UBA Terms.
- 2.3 The standard access principles under clause 5 of schedule 1 to the Act apply to the UBA Service and all of Chorus' obligations under the UBA Terms subject to the limits on the application of those principles under the Act.

## **3. Interpretation**

- 3.1 In interpreting the UBA Terms:
- 3.1.1 clause and section headings are for convenience only and do not affect the interpretation;
  - 3.1.2 a word which denotes the singular also denotes the plural and vice versa;
  - 3.1.3 words denoting natural persons include any legal entity or association of entities and vice versa;
  - 3.1.4 all currency references are to New Zealand dollars and all amounts payable are payable in New Zealand dollars;
  - 3.1.5 the words 'include' and 'including' are to be construed without limitation;
  - 3.1.6 except where the UBA Terms expressly provide otherwise, reference to a statute or regulation means that statute or regulation as amended or re-enacted and includes sub-ordinate legislation;
  - 3.1.7 except where the UBA Terms expressly provide otherwise, references to months are to calendar months; and
  - 3.1.8 except where the UBA Terms expressly provide otherwise, reference to a document (including any technical manual or user guide) means that document as amended from time to time.
- 3.2 In interpreting the UBA Terms references to clauses or sections are references to clauses or sections in the applicable UBA Terms unless expressly provided otherwise.

Sections are identified by a single number (for instance 'this section 3') and clauses by a composite number (for instance 'this clause 3.2').

#### **4. Request to access the UBA Service**

- 4.1 Chorus must comply with a Request by making the UBA Service available to the Access Seeker in accordance with the UBA Terms unless section 30S(2) of the Act applies.
- 4.2 From the date Chorus receives the Access Seeker's Request (Access Date), the Access Seeker and Chorus must comply with the UBA Terms.

#### **5. Application of the UBA Terms**

- 5.1 The UBA Terms are all of the terms on which Chorus will make the UBA Service available to the Access Seeker.
- 5.2 The Access Seeker's rights under the UBA Terms cannot be duplicated by making a subsequent Request. If Chorus becomes entitled to Suspend or terminate supply of the UBA Service to the Access Seeker, any further supply of the UBA Service under the UBA Terms is limited to the existing rights and obligations of the Access Seeker and Chorus under the UBA Terms at that time.
- 5.3 Termination of supply of the UBA Service or the UBA Terms coming to an end does not relieve the Access Seeker or Chorus of any rights or obligations under the UBA Terms which have accrued beforehand.

#### **6. Prerequisites to the UBA Service being made available**

- 6.1 Despite section 4, Chorus has no obligation to make the UBA Service available to the Access Seeker unless the prerequisites in this section 6 are satisfied at all times. For the avoidance of doubt, if the prerequisites in this section 6 are not satisfied and if the provision of the UBA Service to the Access Seeker has commenced, then Chorus' sole remedy shall be to exercise any rights to Suspend in accordance with clause 35.7.2.

#### **Security requirements**

- 6.2 The Access Seeker must provide to Chorus:
  - 6.2.1 evidence reasonably satisfactory to Chorus that the Access Seeker has a long-term credit rating for its senior unsecured indebtedness of at least A3 (Moody's Investor Services), A- (Standard and Poor's Ratings Group) or B+ (AM Best); or
  - 6.2.2 if such evidence cannot be provided, the Access Seeker must provide to Chorus the Access Seeker's choice of an unconditional:
    - (a) Bank guarantee;
    - (b) letter of credit;

- (c) cash prepayment;
- (d) guarantee from the parent company of the Access Seeker if:
  - (i) that parent company has a credit rating which is in accordance with clause 6.2.1; and
  - (ii) where the parent company is not a “company” registered under Part II of the Companies Act 1993, Chorus has approved that company as a guarantor (such approval not to be unreasonably withheld or delayed); or
- (e) other security agreed by Chorus in writing.

### **Security**

6.3 The Security must be in a form reasonably acceptable to Chorus and, in the case of a Bank guarantee or a letter of credit, from a Bank which has a credit rating acceptable to Chorus, acting reasonably. The Security must be for:

6.3.1 \$100,000; or

6.3.2 an amount equal to Chorus’ reasonable estimate of the total value of Charges for the UBA Service Chorus is likely to supply to the Access Seeker under the UBA Terms during any two consecutive month period

whichever is the greater.

6.4 Every six months after the Access Date, if either the Access Seeker or Chorus requests, the amount of the Security must be adjusted. The adjusted Security must meet the same requirements as any Security under clause 6.3 and be for:

6.4.1 \$100,000; or

6.4.2 an amount equal to the total value of Charges under the UBA Terms over the two month period immediately preceding the date of any request under clause 6.4 is made.

whichever is the greater.

6.5 If the adjusted Security amount is an increase, the Access Seeker must, within 20 Working Days after that adjustment date, provide replacement or additional Security that is equal to the new Security amount. If the adjusted Security amount is a decrease, the Access Seeker may cause the Security to be reduced accordingly.

### **Operational requirements**

6.6 The Access Seeker must comply with every applicable prerequisite under the UBA Operations Manual.

## **General rights and obligations**

### **7. General**

#### **Supply of the UBA Service**

- 7.1 Upon the UBA Service being made available under section 4, Chorus will, subject to the UBA Terms, supply the UBA Service to the Access Seeker and the Access Seeker may order the UBA Service in accordance with the processes and procedures under the UBA Operations Manual.

#### **Chorus' relationship with Customers and End Users of the Access Seeker**

- 7.2 No obligation or other legal relationship is created between Chorus and any Customer or End User of the Access Seeker by the UBA Terms. The UBA Terms do not provide, grant or confer any right, benefit or privilege on any Customer or End User of the Access Seeker.

#### **Rights not excluded**

- 7.3 Nothing in the UBA Terms excludes or limits the Commission's, an Access Seeker's or Chorus' right to enforce the UBA Terms or exercise any other rights under the Act.

#### **Interference Management Plan**

- 7.4 Chorus will comply with the Interference Management Plan.

#### **Amendment**

- 7.5 The UBA Terms may be amended by the Commission under the Act including by:
- 7.5.1 a review under section 30R;
  - 7.5.2 a pricing review determination under section 51;
  - 7.5.3 a clarification under section 58; and
  - 7.5.4 a reconsideration under section 59.

#### **Work that Chorus is responsible for performing**

- 7.6 Notwithstanding any other provision in the UBA Terms, Chorus, in relation only to the UBA Service, is responsible for performing all work (including identification of all routes) and/or install all cables within the Exchange in Chorus ducts, within the Exchange Manhole, within the Exchange Entry Point and between the Exchange Manhole and the Exchange Entry Point (where those two points are different).

## **8. The schedules to the UBA General Terms**

### **Compliance**

- 8.1 The Access Seeker and Chorus must comply with each of the schedules to the UBA General Terms.

- 8.2 If there is a conflict between the UBA General Terms and the schedules to the UBA General Terms, the UBA General Terms will prevail except where expressly provided otherwise.

### **Technical manuals and user guides**

- 8.3 The UBA Operations Manual refers to various technical manuals, published international standards and user guides which are listed on Chorus' website ([www.chorus.co.nz](http://www.chorus.co.nz)). They contain technical and procedural detail. Where changes are made to the technical manuals, international standards and user guides that consequently alter the UBA Terms, these changes will be made under the change mechanisms set out in section 9. Such reference to the technical manuals, international standards and user guides is necessary for both the Access Seeker and Chorus so that:
- 8.3.1 uniform standards of best practice are set;
  - 8.3.2 the performance of the Local Loop Network can be maintained;
  - 8.3.3 the health and safety of the Access Seeker's and Chorus' employees, contractors and other agents can be protected;
  - 8.3.4 systems are in place for the management of outages, faults and any work the Access Seeker or Chorus needs to undertake on or around the Local Loop Network or any Exchange; and
  - 8.3.5 the Access Seeker's and Chorus' employees, contractors and other agents have access to uniform technical instructions.
- 8.4 The Access Seeker and Chorus are required to comply with any technical and procedural detail contained in a technical manual, international standard or user guide referred to in the UBA Operations Manual to the extent that they create an obligation to do so.
- 8.5 The technical manuals, international standards and user guides referred to in the UBA Operations Manual may have other unrelated uses and contain terms irrelevant to the UBA Terms.
- 8.6 To the extent that the UBA Operations Manual creates any obligation to comply with a technical manual, international standard or user guide, the Access Seeker and Chorus must:
- 8.6.1 apply the technical manual, international standard or user guide under the UBA Terms in good faith;
  - 8.6.2 interpret the technical manual, international standard or user guide consistently with the UBA Terms; and
  - 8.6.3 comply with the technical and/or procedural detail the technical manual, international standard or user guide contains.

8.7 Subject to clause 8.3, Chorus may amend, change, remove, or replace the technical manuals and user guides where reasonably necessary and not inconsistent with the standard access principles contained in the Act. Chorus must make reasonable efforts to notify parties at least 20 Working Days prior to amending, changing, removing, or replacing a technical manual or user guide.

## **9. Change mechanism for UBA Operations Manual and UBA Service Level Terms**

9.1 Any proposed change to the UBA Operations Manual and UBA Service Level Terms must be approved by the Commission under this section 9.

### **Notice of change**

9.2 Any Access Seeker may give Notice to Chorus proposing a change to the UBA Operations Manual or the UBA Service Level Terms. Chorus has 10 Working Days from the date it receives such Notice to provide comments on the proposed change to the Access Seeker. After the Access Seeker has received Chorus' comments or after the 10 Working Days (which ever is earliest), the Access Seeker may either withdraw the proposed change or elect to proceed with it by giving Notice to Chorus. Chorus must notify the proposed change in accordance with clause 9.3 within five Working Days of receiving Notice from the Access Seeker that it elects to proceed.

9.3 Where any Access Seeker has elected to proceed with a proposed change under clause 9.2 or where Chorus proposes a change to the UBA Operations Manual or the UBA Service Level Terms, Chorus must notify the Commission and all Access Seekers by email and by publishing the proposed change on a Chorus website accessible by the Commission and all Access Seekers.

9.4 Chorus and all Access Seekers have 10 Working Days to object to any proposed change from the date such change is notified under clause 9.3. If:

9.4.1 no written objection is received by Chorus within the 10 Working Days; and

9.4.2 Chorus does not object within the 10 Working Days by notifying all Access Seekers by email and by publishing such objection on a Chorus website accessible by all Access Seekers,

Chorus must submit the proposed change to the Commission for approval under clause 9.14.

### **Objections to change**

9.5 If any Access Seeker or Chorus objects to a proposed change under clause 9.4, Chorus and all Access Seekers have 20 Working Days from the date Notice of the proposed change was given under clause 9.3 to negotiate and agree the proposed change. Negotiation will take place through the Telecommunications Carriers' Forum and will be administered by a Telecommunications Carriers' Forum administrator. Chorus will provide the administrator with a list of all Access Seekers. The administrator will administer the voting process and will confirm in writing the



outcome to Chorus and the Access Seekers. If, despite any objection, the proposed change is agreed by 75% or more of a vote of all Access Seekers and Chorus (where the 75% must include Chorus), Chorus must submit the proposed change to the Commission for approval under clause 9.14.

- 9.6 If the proposed change is not agreed by a vote under clause 9.5, the proposed change may be referred to an independent recommendation maker at the request of the party that proposed the change. The independent recommendation maker must be agreed by Chorus and every Access Seeker that indicates it wishes to be a party to the decision (**the parties to the decision**). If the parties to the decision cannot agree, an independent recommendation maker will be appointed by the Chair of the Telecommunications Carrier's Forum.
- 9.7 To be eligible for appointment, the independent recommendation maker must be impartial, experienced in the relevant area of telecommunications and will preferably be experienced in dispute resolution. Unless the parties to the decision agree, the independent recommendation maker must not have performed any duties, whether as an employee, consultant or contractor, for any of the parties to the decision or any related person during a six month period prior to the date the proposed change was voted on.
- 9.8 The independent recommendation maker must act as an expert and not as an Arbitrator under the Arbitration Act 1996. The independent recommendation maker will be entitled to rely on their own judgement and opinion.
- 9.9 The independent recommendation maker may seek independent legal advice regarding the appropriate procedures for reaching a decision.
- 9.10 The independent recommendation maker should seek to make decisions that are timely, practical, efficient, and take into account the Act, in particular the relevant standard access principles under the Act. The independent recommendation maker must inform all Access Seekers and Chorus of his or her recommendation as to the proposed change and Chorus must submit the proposed change to the Commission for approval under clause 9.14.
- 9.11 If the proposed change is accepted by the independent recommendation maker, the independent recommendation maker's costs are to be met by the parties to the decision that opposed the change. If the proposed change is rejected by the independent recommendation maker, the independent recommendation maker's costs are to be met by the party to the decision that proposed the change.

### **Other reviews**

- 9.12 In addition to any change proposed under clause 9.2:
- 9.12.1 Chorus must review the UBA Operations Manual every 24 months (with the first review commencing on the second anniversary of the UBA Standard Terms Determination being made);

- 9.12.2 Chorus may review the UBA Operations Manual at any time at its discretion, including where any Access Seeker makes a request for an earlier review and Chorus agrees; and
- 9.12.3 Chorus must provide a report to the Commission and Access Seekers summarising the results of the reviews referred to in clauses 9.12.1 and 9.12.2 at the end of each review process.

### **Referral to the Commission**

9.13 Any changes Chorus determines to be necessary or desirable as a result of a review under clause 9.12 must be proposed using the change process under this clause 9.

9.14 Chorus must submit any proposed change to the Commission by email and copying in Access Seekers. The proposed change must have:

9.14.1 an updated version of the of the UBA Operations Manual or UBA Service Level Terms (as the case may be) containing the proposed change;

9.14.2 the reasons for the proposed change; and

information on which Parties agree or disagree with the proposed change; and the Commission will advise whether a proposed change is approved or not within 10 Working Days of receipt of that proposed change, unless otherwise agreed between the Commission and the Parties.

### **Notice of approval of proposal**

9.15 If the proposed change is approved by the Commission, Chorus must give Notice to all Access Seekers of when the change takes effect together with providing an updated version of the UBA Operations Manual or the UBA Service Level Terms (as the case may be) containing the change.

9.16 For the avoidance of doubt, nothing in this section 9 prevents the Access Seeker or Chorus from seeking any remedies or exercising any other rights available to it under the Act.

## **10. Adding UBA Service variants**

10.1 Where Chorus proposes to:<sup>3</sup>

10.1.1 offer the Access Seeker with any New UBA Variant; or

10.1.2 offer Customers of Chorus with any service, the provision of which is dependent on a New UBA Variant and include the following information in the Notice:

(a) the launch date of the New UBA Variant;

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<sup>3</sup> Decision No 636 (11 April 2008).

- (b) the service description of the New UBA Variant which must include the information specified in clause 10.2;
- (c) the price of the new UBA Variant; and
- (d) advice regarding the level of equivalence that will apply to the provisions of the New UBA Variant to Access Seekers on the launch date of the New UBA Variant.
- (e) an explanation as to why Chorus believes the New UBA Variant does not fall within the existing UBA Service Description;

Chorus must first:

- 10.1.3 give as much notice as possible, but at least 20 Working Days Notice to the Commission and the Access Seeker of that New UBA Variant; and
  - 10.1.4 publish the Notice on a Chorus website accessible by the Commission and all Access Seekers.
- 10.2 The service description of the New UBA Variant must address the following matters:
- 10.2.1 the key attributes of the New UBA Variant;
  - 10.2.2 the network specifications of the New UBA Variant;
  - 10.2.3 any network constraints on the delivery of the New UBA Variant;
  - 10.2.4 any requirement relating to the geographic availability of the New UBA Variant;
  - 10.2.5 any other services that must be purchased by the Access Seeker with the New UBA Variant; and
  - 10.2.6 any other explanation of the service that distinguishes the proposed New UBA Variant from other services supplied by Chorus under the UBA Standard Terms Determination.
- 10.3 For the avoidance of doubt, following a Notice pursuant to clauses 10.1.3 the Commission may exercise its powers under the Act, including a review under section 30R, to amend the UBA Terms.

## **The Access Seeker's Rights and Obligations**

### **11. General**

- 11.1 Whenever Chorus supplies the UBA Service to the Access Seeker, the Access Seeker will:
  - 11.1.1 follow Chorus' reasonable directions about the use of the UBA Service which Chorus reasonably believes are:

- (a) in the interests of health and safety;
  - (b) necessary to ensure the quality of service to Chorus' Customers, the Access Seeker's Customers or any Other Service Provider's customers; or
  - (c) necessary to prevent a risk to persons and property;
- 11.1.2 use all reasonable endeavours to provide such information as Chorus may reasonably require in order for Chorus to perform its obligations under the UBA Terms;
- 11.1.3 use all reasonable endeavours to ensure that information disclosed is correct and complete to the best of the Access Seeker's knowledge at the time of provision of the information;
- 11.1.4 use the UBA Service for lawful purposes, in accordance with all applicable laws and without being a nuisance to anyone;
- 11.1.5 never interfere with the reasonable use of any service by any Customer of Chorus or any customer of an Other Service Provider;
- 11.1.6 where required under the UBA Terms, use all reasonable endeavours to obtain any third party authorisation, licence or consent necessary or prudent for Chorus to supply the UBA Service to the Access Seeker (other than authorisations, licences or consents required generally by Chorus to operate Chorus' Network);
- 11.1.7 where reasonably requested by Chorus, provide reasonable assistance to Chorus in obtaining any third party authorisation, licence or consent necessary or prudent for Chorus to supply the UBA Service to the Access Seeker (other than authorisations, licences or consents required generally by Chorus to operate Chorus' Network); and
- 11.1.8 except where the law requires otherwise, only use the UBA Service in ways that are contemplated by the UBA Terms.
- 11.2 The Access Seeker must use all reasonable endeavours to ensure that there is included in:
- 11.2.1 each contract it has with a Customer for the provision of services which rely, in whole or in part, on the UBA Service; and
  - 11.2.2 where the Customer in clause 11.2.1 is an Other Service Provider, each contract that the Other Service Provider has with a customer for the provision of services which rely, in whole or in part, on the UBA Service;
- a provision which excludes (to the maximum extent permitted by law) all liability of Chorus arising from or in connection with the services which rely,

in whole or in part, on the UBA Service, at least to the same extent as provided to the Access Seeker.

- 11.3 The Access Seeker must use all reasonable endeavours to include in each contract with End-Users (whether they are the Access Seekers End-Users or the End-User of an Other Service Provider who is a Customer of the Access Seeker) for a service which relies in whole or in part on the UBA Service:
- 11.3.1 a provision which requires the End-User to acknowledge that certain equipment and lines installed on their property and used for the provision of services to the End-User are the property of the Access Seeker, Chorus, or a third party, and are not fixtures, and may be removed without recourse to legal proceedings;
  - 11.3.2 a provision under which the End-User waives any rights, title, or interest in the property of the Access Seeker, Chorus, or a third party installed on their property;
  - 11.3.3 notice to the End-User that Chorus may require access to the End-User's premises in order to provide the services and that, if such access is denied, there may be interruptions to, or disconnection of, the services.
- 11.4 The Access Seeker must indemnify Chorus from any claims for damages made by the End-User, except where such claims arise from loss or damage to personal property caused by Chorus or an agent or contractor of Chorus.
- 11.5 To the extent the Access Seeker is unable to obtain the provisions of 11.3 in its contract with an End-User, the Access Seeker must, subject to the limitations in clauses 17.1 and 17.2, indemnify Chorus for and against any loss of, damage to, or interference with, Chorus Equipment caused by that End User that is used in the provision of the UBA Service.

## **12. The Access Seeker's responsibility for Customers and End Users**

- 12.1 The Access Seeker will, independently of Chorus, manage all aspects of its relationship with its Customers and End Users, including being responsible for:
- 12.1.1 customer service and enquiries;
  - 12.1.2 product information, service, fault reporting and technical issues;
  - 12.1.3 contact with the police and other government authorities; and
  - 12.1.4 invoicing and settlement.

## **Charges, Payment, Non-payment and Invoice Error Disputes**

### **13. Charging principles**

- 13.1 The Access Seeker must pay all Charges for supply of the UBA Service to the Access Seeker under the UBA Terms, regardless of who uses the UBA Service. The Charges payable are set out in the UBA Price List and fixed in accordance with the UBA Terms.
- 13.2 The Access Seeker must pay GST in accordance with the Goods and Services Tax Act 1985 on all Charges. All Charges are expressed before the addition of GST, except any Charge expressly stated in writing by Chorus to be GST inclusive.
- 13.3 Except as expressly provided under the UBA Terms:
- 13.3.1 Charges for the UBA Service are payable for the period beginning on the date the UBA Service (or the relevant part of it) is capable of being used unless the Access Seeker and Chorus have agreed a scheduled operational date for the UBA Service (or the relevant part of it), in which case Charges will not be payable for any period before that date unless the UBA Service is actually being used before that date; and
- 13.3.2 where the UBA Service is supplied for a part period, a pro rata adjustment to the Charges will be made by Chorus and, where necessary, a refund will be made to the Access Seeker.
- 13.4 The Access Seeker must not rely on any information from Chorus concerning the tax treatment of any payments under the UBA Terms, or any other matter relating to tax in relation to the UBA Terms and the Access Seeker is responsible for determining the correct tax treatment of such matters.

### **14. Invoicing and payment of Charges**

#### **Invoices**

- 14.1 Chorus will invoice the Access Seeker for all Charges.
- 14.2 Chorus' invoices must include reasonable information to enable the Access Seeker to check the accuracy of all Charges.
- 14.3 The due date of each invoice will be specified in the invoice but will not be less than 20 Working Days following the date of invoice.

#### **Payment**

- 14.4 Except as expressly provided under the UBA Terms:
- 14.4.1 all Charges invoiced by Chorus must be paid by the Access Seeker on or before the due date;
- 14.4.2 all Charges invoiced by Chorus must be paid by the Access Seeker by electronic funds transfer in cleared funds to a place or bank account nominated by Chorus free of any deduction, set off or withholding (the only

exceptions to the prohibition on deduction, set off and withholding are section 16 and any set off in accordance with the UBA Service Level Terms); and

- 14.4.3 payments must not be made by credit card.
- 14.5 The Access Seeker must provide Chorus with sufficient information to allow Chorus to allocate any payment to a particular invoice or invoices and provide any information reasonably requested by Chorus for this purpose.
- 14.6 If the Access Seeker does not pay an invoice by the due date for payment, the Access Seeker will be in Default and Chorus may charge the Access Seeker default interest on the unpaid amount on a daily basis from the due date until payment is made. The default interest rate is the Bill Rate plus 2%.
- 14.7 Under no circumstances does payment of any amount unpaid under the UBA General Terms release the Access Seeker from liability for any interest payable on that amount.
- 14.8 Neither the Access Seeker's obligation to pay interest under the UBA Terms, nor the performance of that obligation, prejudices Chorus' rights in respect of the Access Seeker's non-payment of an amount on its due date.

#### **Electronic invoicing and billing reports**

- 14.9 Chorus must provide monthly billing information to the Access Seeker in an electronic format, as set out in the UBA Operations Manual.
- 14.10 Chorus must to provide a hardcopy of monthly billing information when requested by the Access Seeker, in which case Chorus will charge the Access Seeker in accordance with the UBA Price List.
- 14.11 Chorus must, where practicable, provide billing reports and information additional to the information required by this section 14 when requested by the Access Seeker, in which case Chorus will charge the Access Seeker in accordance with the UBA Price List.

#### **Time limit for invoicing**

- 14.12 Nothing under the UBA Terms or in any invoice prejudices Chorus' right to invoice the Access Seeker for any Charges except that no Charge may be invoiced 100 days or more after the date the UBA Service to which that Charge relates was supplied.

### **15. Non-payment**

- 15.1 Where the Access Seeker fails to pay any amount due under the UBA Terms (other than an amount withheld in accordance with section 16 or set off in accordance with the UBA Service Level Terms), Chorus may give Notice to the Access Seeker to pay that amount within 20 Working Days of the Notice being given (**Non-Payment Notice**). A Non-Payment Notice must state the amount due and may be given to the Access Seeker at any time from the date on which the UBA Terms provides for

interest to begin to accrue on the amount due (regardless of whether interest is charged).

- 15.2 A Non-Payment Notice will not be affected by the Access Seeker giving a Dispute Notice to Chorus unless the Non-Payment Notice purports to require payment of an amount withheld in accordance with section 16 or set off in accordance with the UBA Service Level Terms. In this case the status quo will prevail and the Non-Payment Notice will not give rise to any rights under clause 15.3 or section 36 until the Dispute is resolved.

### **Suspension following Non-Payment Notice**

- 15.3 Chorus may Suspend supply of the UBA Service if Chorus gives the Access Seeker a Non-Payment Notice and the amount due (including any interest charged) is not paid within 20 Working Days of the Non-Payment Notice being given.
- 15.4 Suspension of the UBA Service under clause 15.3 will cease as soon as it is reasonably practicable for Chorus to complete restoration of the UBA Service after the Access Seeker's non-payment is remedied, and in any event must cease no later than four Working Days after the Access Seeker's non-payment is remedied.

## **16. Invoice Disputes**

### **Dealing with Invoice Error Disputes**

- 16.1 If the Access Seeker reasonably and in good faith believes there is a manifest error in either the Charges in an invoice or in the calculation of the amount of an invoice (**Invoice Error**), the Access Seeker may give Notice to Chorus before the due date setting out in full details of:
- 16.1.1 the invoice;
  - 16.1.2 the Invoice Error;
  - 16.1.3 the grounds for the Access Seeker's belief that the Invoice Error exists; and
  - 16.1.4 the amount by which the Access Seeker believes that Chorus has overcharged or undercharged it by reason of the Invoice Error.
- 16.2 Where the Access Seeker believes Chorus has overcharged it by reason of an Invoice Error, the Access Seeker may withhold payment of the amount it believes it has been overcharged until the issue has been resolved in accordance with this section 16. Whenever payment is withheld under this clause 16.2 the Access Seeker must, within 10 Working Days after the due date, give Chorus a full extract detailing each withheld Charge.
- 16.3 If the Access Seeker fails to follow the Notice requirements set out in clause 16.1, then any right under this section 16 to withhold payment of the amount it believes it has been overcharged does not apply.



- 16.4 Following the giving of any Notice of an Invoice Error, the Access Seeker and Chorus must treat that Notice as a Dispute Notice and resolve the Dispute in accordance with section 37. If the Dispute reaches a Deadlock, the Access Seeker and Chorus must refer the Dispute to expert decision.
- 16.5 If it is agreed by the Access Seeker and Chorus or decided under clause 37.7 that an Invoice Error exists in an invoice, depending on whether the amount properly payable by the Access Seeker is more than the amount paid (an underpayment) or less than the amount paid (an overpayment), then:
- 16.5.1 in the case of an underpayment, the Access Seeker must forthwith pay to Chorus the amount of the difference between the amount paid and the amount properly payable;
- 16.5.2 in the case of an overpayment, Chorus must forthwith pay to the Access Seeker the amount of the difference between the amount paid and the amount properly payable, plus interest on that amount at the Bill Rate (as at the date the Access Seeker made the overpayment) plus 2% for the period from the date the Access Seeker made the overpayment to the date of payment, or the date clause 16.10 becomes applicable, whichever is earlier;  
or
- 16.5.3 in the case of an Invoice Error that affects three or more of any five consecutive invoices and constitutes an overpayment by the Access Seeker that is more than 5% of the amount properly payable by the Access Seeker under such invoices, Chorus must forthwith pay to the Access Seeker the amount of the difference between the amount paid and the amount properly payable, plus interest on that amount at the Bill Rate (as at the date the Access Seeker made the first overpayment) plus 4% for the period from the date the Access Seeker made the first overpayment to the date of payment, or the date clause 16.10 becomes applicable, whichever is the earlier.
- 16.6 If it is agreed by the Access Seeker and Chorus or decided under clause 37.7 that an Invoice Error does not exist, the Access Seeker must forthwith pay any amount withheld plus interest on the amount withheld at the Bill Rate (as at the date of the invoice) plus 2% for the period from the day after the due date to the date of payment of the amount withheld, or the date clause 16.10 becomes applicable, whichever is earlier.

### **Other Invoice Disputes**

- 16.7 Regardless of whether or not the Access Seeker has previously given Notice of an Invoice Error in relation to any invoice, the Access Seeker may give Chorus a Dispute Notice in respect of that invoice, provided that a Dispute Notice cannot be given later than 100 days after the date of the invoice. Any Dispute Notice under this clause 16.7 must comply with clause 37.2 and set out details of the invoice, the disputed amount and the grounds for the Dispute together with any available

supporting evidence. The Access Seeker and Chorus must resolve the Dispute in accordance with section 37.

- 16.8 If a Dispute under clause 16.7 is resolved in favour of the Access Seeker, Chorus must forthwith pay the amount agreed or found to have been overpaid plus interest at the Bill Rate (as at the date of the overpayment) plus 2% on the overpaid amount for the period from the date the overpayment was made to the date of refund of the overpayment or the date clause 16.10 becomes applicable, whichever is earlier.
- 16.9 If a Dispute under clause 16.7 is resolved in favour of Chorus, the Access Seeker must forthwith pay the amount agreed or found to have been underpaid plus interest at the Bill Rate (as at the date the underpayment became due) plus 2% on the underpaid amount for the period from the date the underpayment was paid to the date of payment of the balance or the date clause 16.10 becomes applicable, whichever is earlier.

#### **Interest on unpaid amounts**

- 16.10 Where an amount due from Chorus or the Access Seeker under clause 16.5, 16.6, 16.8, or 16.9 remains unpaid on the 20th Working Day after the date the Dispute is resolved, that Party must pay interest on that amount at the Bill Rate (as at that 20th Working Day) plus 5% for the period from that 20th Working Day to the date of payment of that amount, in addition to the amount due clauses 16.5, 16.6, 16.8, or 16.9.

### **Liability**

#### **17. Access Seeker's liability**

##### **Limitation of the Access Seeker's liability**

- 17.1 The Access Seeker's total liability in respect of any and all Defaults, negligent acts or omissions or breaches of statutory duty is limited to \$2,000,000 in aggregate for all events (connected or unconnected) occurring in any 12 month period, save that this limitation does not apply to the exceptions under clause 17.4.

##### **Exclusion of the Access Seeker's liability**

- 17.2 The Access Seeker's liability for Indirect Damages in respect of any and all Defaults, negligent acts or omissions or breaches of statutory duty is excluded, save that this exclusion does not apply to the exceptions under clause 17.4.

##### **Time bar**

- 17.3 The Access Seeker has no liability to Chorus in respect of any Default, negligent act or omission or breach of statutory duty unless Chorus notifies the Access Seeker of its claim within 12 months after that Default negligent act or omission or breach of statutory duty became reasonably discoverable.

##### **Exceptions to the limitation and exclusion of the Access Seeker's liability**

- 17.4 The limitation under clause 17.1 and the exclusion under clause 17.2 do not apply to:

- 17.4.1 any liability resulting from the Access Seeker's fraud or wilful Default;
  - 17.4.2 any obligation arising under the UBA Terms to pay money in the ordinary course of business;
  - 17.4.3 any liability resulting from the Access Seeker's Default under section 30; or
- 17.5 any liability resulting from the Access Seeker's Default under section 32.

### **Costs of recovering Charges**

- 17.6 The Access Seeker must pay on demand all of Chorus' reasonable expenses (including legal costs on a full indemnity basis) properly incurred by Chorus in exercising its rights to recover any Charge the Access Seeker is liable to pay Chorus under the UBA Terms.

## **18. Chorus' liability**

### **Limitation of Chorus' liability**

- 18.1 Chorus' total liability in respect of any and all Defaults, negligent acts or omissions or breaches of statutory duty is limited to \$2,000,000 in aggregate for all events (connected or unconnected) occurring in any 12 month period, save that this limitation does not apply to the exceptions under clause 18.4.

### **Exclusion of Chorus' liability**

- 18.2 Chorus' liability for Indirect Damages in respect of any and all Defaults, negligent acts or omissions or breaches of statutory duty is excluded, save that this exclusion does not apply to the exceptions under clause 18.4.

### **Time bar**

- 18.3 Chorus has no liability to the Access Seeker in respect of any Default, negligent act or omission or breach of statutory duty unless the Access Seeker notifies Chorus of its claim within 12 months after that Default, negligent act or omission or breach of statutory duty became reasonably discoverable.

### **Exceptions to the limitation and exclusions of Chorus' liability**

- 18.4 The limitation under clause 18.1 and the exclusions under clauses 18.2 do not apply to:
- 18.4.1 any liability resulting from Chorus' fraud or wilful Default;
  - 18.4.2 any obligation arising under the UBA Terms to pay money in the ordinary course of business;
  - 18.4.3 any liability resulting from Chorus' Default under section 30;
  - 18.4.4 any liability arising under clause 31.3;
  - 18.4.5 any liability resulting from Chorus' Default under section 32; or

18.4.6 any Performance Penalty which may be payable by Chorus.

### **Costs of recovering Performance Penalties**

18.5 Chorus must pay on demand all of the Access Seeker's reasonable expenses (including legal costs on a full indemnity basis) properly incurred by the Access Seeker in exercising its rights to recover any Performance Penalty Chorus is liable to pay the Access Seeker under the UBA Terms.

## **19. General**

19.1 Nothing under the UBA Terms excludes or limits:

19.1.1 any statutory liability of the Access Seeker or Chorus (to the extent that the law prohibits excluding or limiting such liability); or

19.1.2 the Access Seeker's or Chorus' liability to pay any costs of, or awarded in, any proceeding, expert decision, arbitration or mediation.

19.2 Each term of sections 17 and 18:

19.2.1 is a separate limitation, exclusion or indemnity (as the case may be) applying and surviving even if one or more of such terms is inapplicable or held unreasonable in any circumstances; and

19.2.2 takes effect so that every limitation, exclusion and indemnity (as the case may be) is not affected by the UBA Terms coming to an end.

## **20. Force Majeure**

20.1 In this section 20:

20.1.1 **Force Majeure Event** means any event beyond the reasonable control of a Party, including:

- (a) act of God or force of nature (including fire, earthquake, flood, landslide and weather of exceptional severity);
- (b) public mains electrical supply failure;
- (c) serious accident the cause of which is unconnected to the Party relying on the Force Majeure Event (including explosion and radioactive contamination);
- (d) requirement or restriction of or failure to act by any government, regulatory or judicial entity (including any requirement to comply with a statutory or regulatory obligation) other than any exercise of power under the Act in relation to the UBA Terms itself;
- (e) epidemic, or national or local emergency (whether in fact or law);

- (f) sabotage, riot, insurrection, terrorism or civil disorder;
- (g) military operations or war (whether declared or not);
- (h) industrial dispute of any kind (provided that, in circumstances where the industrial dispute involves its own employees, the Party relying on the Force Majeure Event must have taken reasonable actions to prevent such industrial dispute from arising); or
- (i) acts or omissions of strangers for whom the Party relying on the Force Majeure Event is not responsible (for the avoidance of doubt, the Access Seeker and Chorus are responsible for all of their respective contractors, employees, servants and agents),
- (j) but does not include:
- (k) any event which the Party relying on the Force Majeure Event could have avoided or overcome by exercising a standard of reasonable care at a reasonable cost; or
- (l) a lack of funds for any reason or any other inability to pay.

20.2 Notwithstanding anything in the UBA Terms, neither the Access Seeker nor Chorus is liable for any cost, liability, loss, damage or expense (including legal and other professional costs) for not meeting or for any delay in meeting any obligation under the UBA Terms (other than any obligation arising under the UBA Terms to pay money in the ordinary course of business) caused by a Force Majeure Event.

20.3 Where the Access Seeker or Chorus rely on a Force Majeure Event in respect of any failure or delay in meeting its obligations under the UBA Terms, it must forthwith give Notice to the other Party of the estimated extent and duration of its inability to perform or delay in performing its obligations.

20.4 Upon cessation of the effects of a Force Majeure Event any Party relying on it must forthwith give Notice to the other Party of such cessation.

20.5 A Force Majeure Event does not discharge any Party relying on it from any obligation accrued beforehand. Any Party relying on a Force Majeure Event must continue to perform those of its obligations not affected by the Force Majeure Event.

20.6 Any Party affected by a Force Majeure Event will use all reasonable endeavours to mitigate as soon as practicable those consequences of that Force Majeure Event which have affected its obligations under the UBA Terms, and will keep the other Party fully informed about the status of the Force Majeure Event and the extent to which it is preventing the first Party from performing those obligations.

20.7 To the extent that Chorus is prevented as a result of a Force Majeure Event from providing all or part of the UBA Service, the Access Seeker is not required to pay the

Charges that apply to that part of the UBA Service that is not provided by Chorus during the Force Majeure Event.

## Service Disruption

### 21. Outages

21.1 Chorus must, where practicable, give the Access Seeker reasonable advice of anything that Chorus is aware of which is likely to adversely affect the UBA Service to the same extent that it provides advice and notification to any Customer or to another part of Chorus.

#### Planned Outages

21.2 Chorus may Suspend supply of the UBA Service for the purpose of conducting works, routine maintenance, remedial work or upgrades to Chorus' Network (**Planned Outage**).

21.3 Chorus must:

21.3.1 use all reasonable endeavours to conduct any Planned Outage between the hours of 11.00 pm to 6.00 am inclusive where Chorus believes that is practicable and in such manner as to minimise, to the extent practicable, any impact on the provision of the UBA Service to the Access Seeker;

21.3.2 advise the Access Seeker in advance of any Planned Outage:

- (a) to the same extent that it provides advice and notification to any Customer or to another part of Chorus; but
- (b) at least within the timeframe set out in the UBA Service Level Terms; and

21.3.3 in respect of any advice of a Planned Outage, provide the following information:

- (a) a brief explanation of the reason for the Planned Outage;
- (b) the intended date, time and duration of the Planned Outage;
- (c) a description of the UBA Service (or the relevant part of it) which will be affected by the Planned Outage; and
- (d) the name and contact details of Chorus' representative(s) who gave the advice.

#### Unplanned Outages

21.4 Chorus may Suspend supply of the UBA Service:

21.4.1 due to any unplanned unavailability of, or interruption to, Chorus' Network or the UBA Service; or

21.4.2 in order to provide or safeguard service to the emergency or other essential services,

**(Unplanned Outage).**

21.5 Chorus must:

21.5.1 use all reasonable endeavours to give the Access Seeker as much advice as possible of the existence of any Unplanned Outage;

21.5.2 advise the Access Seeker of any Unplanned Outage within the timeframe set out in the UBA Service Level Terms; and

21.5.3 use all reasonable endeavours to answer any reasonable questions from the Access Seeker about the extent and duration of any Unplanned Outage.

21.6 Chorus must act reasonably and in good faith in

21.6.1 planning and implementing any Planned Outage; and

21.6.2 managing any Unplanned Outage

with a view to minimising the impact on the Access Seeker and Customers and End-Users of the Access Seeker.

21.7 If the Access Seeker becomes aware of any Unplanned Outage before it receives advice from Chorus under clause 21.5, the Access Seeker must make reasonable efforts to notify Chorus as soon as reasonably practical.

## **Faults**

### **22. Responsibility for faults**

22.1 Chorus is responsible for fixing:

22.1.1 any faults which affect the UBA Service and are in Chorus' Network, Chorus' Systems, or in Chorus Owned Equipment, except where a fault is the Access Seeker's responsibility under clause 22.2; and

22.1.2 any faults which affect the UBA Service and are in the Access Seeker's Network or Access Seeker Equipment but are due to any act or omission of Chorus.

22.2 The Access Seeker is responsible for:

22.2.1 any faults which affect the UBA Service and are in Chorus' Network or Chorus Owned Equipment but are due to any act or omission of the Access Seeker or of a Customer or End User of the Access Seeker or an End User of the Access Seeker;

22.2.2 any faults in the Access Seeker Equipment; and

22.2.3 any faults in the Access Seeker's Network.

22.3 Despite the Access Seeker's responsibilities under clause 22.1, this section 22 does not create any right for the Access Seeker to access any property controlled by Chorus or fix any equipment or other thing unless expressly provided otherwise in the UBA Terms.

22.4 Where the Access Seeker is responsible for a fault under clause 22.1 that it has no right of access to fix, it may engage Chorus to fix that fault on its behalf in accordance with the UBA Operations Manual at the Charge specified in the UBA Price List.

## 23. Diagnosing faults

23.1 The Access Seeker must operate a competent and sufficiently resourced faults reporting service for Customers and End Users of the Access Seeker.

23.2 Before asking Chorus to investigate any fault, the Access Seeker must:

23.2.1 confirm the presence of a fault;

23.2.2 perform an initial fault diagnosis to identify where the fault has arisen;

23.2.3 use all reasonable endeavours to investigate the fault and find out all relevant information from its Customer or End User; and

23.2.4 confirm the fault is one that Chorus is responsible for fixing under clause 22.1.

## 24. Reporting faults to Chorus

24.1 Once the Access Seeker has complied with clause 23.2 it must report any fault that Chorus is responsible for fixing under clause 22.1 to Chorus and provide details of it (**Reported Fault**). The procedures for making and acknowledging a Reported Fault are set out in the UBA Operations Manual.

24.2 Where the Reported Fault is outside Chorus' responsibility under clause 22.1 or Chorus cannot confirm the presence of a fault, then Chorus may charge the Access Seeker in accordance with the UBA Price List.

24.3 Chorus must not accept any report of a fault from a Customer or End User of the Access Seeker. Any Customer or End User of the Access Seeker mistakenly contacting Chorus will be advised to contact the Access Seeker. The Access Seeker must ensure that all of its Customers and End Users are informed that all faults must be reported to the Access Seeker.

## 25. Fixing faults

25.1 A Reported Fault that is Chorus' responsibility under clause 22.1 will be fixed by Chorus between the hours of 7.00 am and 7.00 pm seven days a week. Procedures for fixing emergency faults are set out in the UBA Operations Manual.



- 25.2 Where entry into the property of, or interaction with, any Customer or End User of the Access Seeker is not required, Chorus may attend the premises of that Customer or End User to fix a fault without needing to arrange a site visit with the Access Seeker.
- 25.3 The Access Seeker will facilitate contact with any relevant Customer or End User of the Access Seeker and/or arrange a site visit whenever clause 25.2 does not apply and this is reasonably required by Chorus to clarify the nature of, or undertake work to fix, any Reported Fault. Chorus may communicate with a Customer or End User of the Access Seeker directly so long as such communications are confined to technical matters directly concerning the Reported Fault. Chorus must comply with the customer contact procedures set out in the UBA Operations Manual.
- 25.4 Upon Chorus' acknowledgement of a Reported Fault that is Chorus' responsibility under clause 22.1 Chorus must:
- 25.4.1 comply with the UBA Operations Manual;
  - 25.4.2 diagnose and fix the Reported Fault;
  - 25.4.3 following the initial diagnosis, provide an indication to the Access Seeker of the likely time to fix the Reported Fault, provided that Chorus has no obligation to provide such indication if the Reported Fault is fixed at the time of initial diagnosis; and
  - 25.4.4 if requested by the Access Seeker provide progress reports after expiry of the indicated fault restoration timeframe (such progress reports must include the steps taken by Chorus to fix the Reported Fault and the expected time remaining until the Reported Fault will be resolved, if known),
- in each case using all reasonable endeavours to meet the timeframes set out in the UBA Service Level Terms or, if there are none, the fault restoration timeframe indicated when the Reported Fault was made or as advised in the most recent progress report provided under clause 25.4.4.

## **Chorus' Network, Chorus Owned Equipment and Property**

### **26. Safeguarding Chorus' Network and Chorus Owned Equipment**

- 26.1 For the Access Seeker's own safety, and so that services supplied to Customers of Chorus are not disrupted, the Access Seeker must help safeguard Chorus' Network and Chorus Owned Equipment. The Access Seeker must:
- 26.1.1 follow Chorus' reasonable directions when connecting anything to Chorus' Network or any Chorus Owned Equipment and make sure it complies with the UBA Operations Manual;
  - 26.1.2 only allow people authorised by Chorus to work on or around Chorus' Network or Chorus Owned Equipment; and

- 26.1.3 make sure everyone the Access Seeker is responsible for also meets these obligations.
- 26.2 Chorus is responsible for the safe operation and upgrading of Chorus' Network in a manner that does not:
  - 26.2.1 endanger the safety or health of any of the Access Seeker's employees, contractors, agents or Customers; or
  - 26.2.2 damage, interfere with or cause any deterioration in the operation of the Access Seeker's Network. However Chorus will not be responsible for any damage to, interference with, or deterioration of the Access Seeker's Network that is caused by the Access Seeker's failure to ensure that the Access Seeker's Network is compatible with Chorus' Network.
- 26.3 Chorus must not unreasonably withhold or delay granting authorisation under clause 26.1.2.

## **27. Network performance**

- 27.1 A Party's Network may affect the performance of the second Party's Network. If there is an issue affecting the performance of a Party's Network then, without prejudice to the other terms of the UBA Terms, that Party (Affected Party) may require the other Party to meet with it within a reasonable time frame. At that meeting the Parties must discuss in good faith and endeavour to agree the steps the other Party will take, and the timeframes for taking those steps, to mitigate the effects on the Affected Party's Network.

## **28. Responsibilities for Chorus Owned Equipment**

- 28.1 At the time any Chorus Owned Equipment is supplied, Chorus will use all reasonable endeavours to make sure it is safe, durable and approved for connection to the rest of Chorus' Network.
- 28.2 Where Chorus supplies the Access Seeker with any Chorus Owned Equipment, the Access Seeker will, where applicable:
  - 28.2.1 leave the Chorus Owned Equipment installed and not use it otherwise than in accordance with the UBA Operations Manual;
  - 28.2.2 protect the Chorus Owned Equipment from radio or electrical interference, power fluctuations, abnormal environmental conditions, theft and any other risks of loss or damage, except where such risks of loss or damage are caused by Chorus;
  - 28.2.3 meet any requirements set out in the UBA Operations Manual relating to the Chorus Owned Equipment;

- 28.2.4 if the Chorus Owned Equipment is lost, stolen or damaged, notify Chorus directly and pay for repairing or replacing it, except where the loss, theft or damage was caused by Chorus;
  - 28.2.5 follow Chorus' reasonable directions when using the Chorus Owned Equipment and never use the Chorus Owned Equipment for purposes for which it is not designed; and
  - 28.2.6 not encumber Chorus' title to the Chorus Owned Equipment or expose such title to third Party claims and notify Chorus if it becomes aware of any third Party claim.
- 28.3 When any Chorus Owned Equipment is no longer required the Access Seeker:
- 28.3.1 must return the Chorus Owned Equipment to Chorus;
  - 28.3.2 will take reasonable care to avoid causing damage when returning the Chorus Owned Equipment to Chorus and be responsible for any damage to the Chorus Owned Equipment; and
  - 28.3.3 must pay all Charges for the Chorus Owned Equipment until such time as it is returned to Chorus.
- 28.4 Chorus must:
- 28.4.1 maintain the Chorus Owned Equipment to the same specifications that Chorus maintains equivalent equipment used to supply the UBA Service to itself; and
  - 28.4.2 where necessary to ensure the Access Seeker is able to meet its obligations under clause 28.2 provide the Access Seeker with adequate and timely information regarding these specifications.

## **29. Property rights**

### **Chorus' property rights**

- 29.1 Acquiring the UBA Service from Chorus does not give the Access Seeker any property rights or beneficial interest in any part of Chorus' Network. The supply of any Chorus Owned Equipment or software to the Access Seeker, or the Access Seeker's use of Chorus Owned Equipment or software, does not give the Access Seeker any beneficial interest in that Chorus Owned Equipment or software.

### **Personal Property Securities Act 1999**

- 29.2 Where any lease or bailment of:
- 29.2.1 Chorus Owned Equipment to the Access Seeker; or
  - 29.2.2 any property of the Access Seeker to Chorus,

constitutes a security interest for the purposes of the Personal Property Securities Act 1999 (**PPSA**), then:

- 29.2.3 Chorus or the Access Seeker (as the case may be) may perfect its security interest by registering a finance statement in the Personal Property Securities Register; and
- 29.2.4 this clause shall constitute a security agreement for the purposes of the PPSA.

### **30. Intellectual Property**

- 30.1 Except as expressly provided under the UBA Terms, any Intellectual Property created or owned by Chorus shall remain the property of Chorus, and any Intellectual Property created or owned by the Access Seeker shall remain the property of the Access Seeker. Nothing under the UBA Terms:
  - 30.1.1 confers any assignment, right, title or licence of one Party's Intellectual Property to the other; or
  - 30.1.2 restricts the rights of Chorus or the Access Seeker to own, use, enjoy, licence, assign or transfer its own Intellectual Property.
- 30.2 All Intellectual Property in any improvements or changes to the UBA Service devised or made by anyone during the time Chorus is supplying the UBA Service to the Access Seeker, belong to Chorus.

### **31. Software and Chorus' Systems**

- 31.1 Where Chorus provides the Access Seeker with any software to use or grants the Access Seeker access to a Chorus System:
  - 31.1.1 Chorus shall advise the Access Seeker of the purpose of the software or access to the Chorus System;
  - 31.1.2 Chorus remains the owner or licensee of the software or Chorus System and has the right to allow the Access Seeker to use it, and must maintain all necessary licenses and sufficient control to provide the UBA services using the Chorus' Systems;
  - 31.1.3 the Access Seeker may use the software or Chorus System only for the purposes for which it is provided;
  - 31.1.4 the Access Seeker's right to use the software or Chorus System is personal to the Access Seeker and may not be transferred to anyone else;
  - 31.1.5 the Access Seeker will not change or interfere with the software or Chorus System in any way;

- 31.1.6 the Access Seeker must protect and secure its usernames and passwords from unauthorised use;
  - 31.1.7 the Access Seeker will not use the software or Chorus System to recreate any source code;
  - 31.1.8 the Access Seeker will not copy any part of the software or Chorus System except for the purposes of Chorus approved backup or testing procedures; and
  - 31.1.9 the Access Seeker's right to use the software or Chorus System will continue until either:
    - (a) supply of the UBA Service has been terminated; or
    - (b) Chorus reasonably believes that the Access Seeker has breached any obligation under this clause 31.1, in which case Chorus may Suspend or terminate the Access Seeker's right to use the software or Chorus System immediately, with Chorus having no liability to the Access Seeker.
- 31.2 Chorus may at any time provide upgrades or new versions of any software. Provided that an upgrade or new version does not adversely affect supply of the UBA Service, or the Access Seeker's use of the UBA Service, the Access Seeker will install the upgrade or new version at its own cost:
- 31.2.1 as soon as it reasonably can and no later than six months after Chorus provides it; or
  - 31.2.2 immediately, if Chorus notifies the Access Seeker that the UBA Service may be adversely affected if the upgrade or new version is not installed immediately.
- 31.3 Chorus indemnifies the Access Seeker against cost, liability, loss, damage or expense (including legal and other professional costs) that the Access Seeker incurs or suffers as a result of any claim or proceeding that is made, threatened or commenced by any third Party where that claim or proceeding is a result of the Access Seeker's proper and lawful use of the Chorus' Systems or software under the UBA Terms.

## Information

### 32. Confidential Information

- 32.1 In this section 32:
- 32.1.1 **Disclosing Party** means (as the context requires):
    - (a) the Access Seeker when disclosing information to Chorus; and
    - (b) Chorus when disclosing information to the Access Seeker.

- 32.1.2 **Receiving Party** means (as the context requires):
- (a) the Access Seeker when receiving information from Chorus; and
  - (b) Chorus when receiving information from the Access Seeker.
- 32.1.3 **Access Seeker** includes any Related Company of the Access Seeker.
- 32.1.4 Chorus includes any Related Company of Chorus.
- 32.1.5 **Confidential Information** means all information which is confidential or proprietary to the Disclosing Party and is used or disclosed in connection with the UBA Terms, including information which is confidential or proprietary to a third Party and is used or disclosed in connection with the UBA Terms by the Disclosing Party under licence from that third Party and including information derived from Confidential Information, but excludes:
- (a) information which is independently developed by the Receiving Party outside the scope of the UBA Terms, provided that such development did not rely on any Confidential Information;
  - (b) information obtained from a source independent of the Disclosing Party;
  - (c) information which was publicly available at the time it was received;
  - (d) information which was known to the Receiving Party at the time it was received or becomes publicly available after the time it was received other than by a breach of an obligation of confidence;
  - (e) information required to be released under any applicable law or the regulations of a stock exchange on which the Receiving Party's shares are listed;
  - (f) information expressly stated under the UBA Terms to be disclosed to the public or telecommunications industry;
  - (g) information expressly stated under the UBA Terms not to be Confidential Information; or
  - (h) any press release or other public statement that is agreed by the Access Seeker and Chorus.
- 32.1.6 **Confidential Customer Information** means all information which a Party ("**the first Party**") provides to the other Party on a confidential basis, or which the other Party holds or obtains, concerning a particular person who is or intends to become a Customer of the first Party. It includes the fact that the person intends to subscribe for or has subscribed for any of the first Party's services and includes information about that Customer which is generated from usage records made by that Customer or by End Users of

any service provided to that Customer that relies (in whole or in part) on the UBA Service but excludes the contents of these UBA Terms and any information (including information which was formerly Confidential Customer Information):

- (a) obtained from the person or from any other source independent of either Party;
- (b) which is publicly available and is obtained from a public source;
- (c) which is both contained in and generated from a Party's own billing records relating to its Customers other than billing records relating to its services to the other Party;
- (d) resulting from the fact that a Customer has commenced receiving a service from the Access Seeker that relies (in whole or in part) on the UBA Service, the identity of that Customer, and all information associated with the commencement of that service; or
- (e) expressly stated in these UBA Terms not to be Confidential Customer Information.

32.2 Subject to the following clauses of this section 32, a Receiving Party shall keep Confidential Information in confidence and will not (and will ensure that its directors, employees, and professional advisors do not) disclose Confidential Information to any third Party or use any of the Confidential Information other than as necessary for the performance of the UBA Terms.

32.3 A Receiving Party shall exercise the greater of:

- 32.3.1 the degree of care of Confidential Information that a reasonable person with knowledge of the confidential nature of the Confidential Information would apply; and
- 32.3.2 the security or degree of care that it applies to its own Confidential Information of an equivalent nature.

32.4 A Receiving Party shall restrict disclosure of Confidential Information within itself to those persons who have a reasonable need to know.

32.5 A Receiving Party may disclose Confidential Information to a contractor, agent or professional advisor where that person has a need to know, provided that the Receiving Party will be responsible for any disclosure of the Confidential Information by that person where such disclosure would be a breach of this section 32 if made by the Receiving Party.

32.6 A disclosure of Confidential Information will not constitute a breach of this section 32 where it is:

- 32.6.1 authorised in writing by the Disclosing Party to the extent of that authority;
  - 32.6.2 to an emergency organisation;
  - 32.6.3 properly made pursuant to a relevant statutory or regulatory obligation;
  - 32.6.4 disclosed to the Commission.
  - 32.6.5 properly and reasonably made to the Court or any person appointed by the Access Seeker and Chorus under section 37 to resolve a Dispute; or
  - 32.6.6 to obtain or maintain any listing on any recognised stock exchange,
- subject (in the case of any disclosure specified in clauses 32.6.3 to 32.6.6) to the Receiving Party informing the Disclosing Party as soon as reasonably practicable, after such disclosure.
- 32.7 Each Party must use reasonable care to ensure that it does not use Confidential Customer Information for sales or marketing purposes, which means using the information in a manner designed to prevent or encourage the transfer of a Customer from one Party to the other or the subscription to a service (that relies, in whole or in part, on the UBA Service) offered by a Party (whether or not that service is offered by the other Party), except that:
- 32.7.1 this clause is not intended to prevent a Party using any information about one of its Customers (who may also be a Customer of the other Party) which is generated solely within the first Party's Network from its own records relating to its own services provided that any such information a Party generates through transferring one of its Customers to a service provided by the other Party must not be used for sales and marketing purposes before completion of the transfer process. For example, billing information of one Party indicating that a person who is a Customer of that Party is dialling and/or receiving calls from numbers allocated to the other Party is not Confidential Customer Information of the other Party; and
  - 32.7.2 each Party acknowledges that the other Party's personnel (or those of the other Party's Related Companies) may engage in multiple roles or functions and a Party does not breach this clause merely because Confidential Customer Information is provided other than for sales and marketing purposes to a person who has multiple roles or functions (one of which is sales or marketing). Each Party must ensure that its personnel directly involved in the supply of the UBA Service may not, at the same time, be involved in marketing or sales to that Customer. To avoid doubt, nothing in this clause 32.7.2 prevents either Party restructuring the operational aspects of its business.
  - 32.7.3 Each Party acknowledges that damages may not be an adequate remedy in the case of a breach of sections 32 or 33, and that either Party may seek an injunction or interlocutory relief in these circumstances.



### 33. Access Seeker Information

- 33.1 Subject to the requirements of confidentiality imposed under section 32, Chorus may collect information about the Access Seeker and Customers and End Users of the Access Seeker where and to the extent that such information is reasonably required for the purpose of providing the UBA Service (**Access Seeker Information**). Access Seeker Information may be obtained from the Access Seeker or generated within Chorus' Network when the Access Seeker or anyone else uses the UBA Service.
- 33.2 For the avoidance of doubt, nothing in this section 33 shall require the Access Seeker, or entitle Chorus, to do anything in breach of any statutory or regulatory obligation or in breach of any confidentiality obligation to a third Party.
- 33.3 Chorus may:
- 33.3.1 hold Access Seeker Information and share it with its employees, contractors and other agents who are directly involved in the provision of the UBA Service, but only where and to the extent that this is necessary to enable Chorus to provide the Access Seeker with the UBA Service, send the Access Seeker invoices, check that the Access Seeker's obligations are being met, or otherwise to administer and enforce the UBA Terms;
  - 33.3.2 share Access Seeker Information with Other Service Providers, but only where and to the extent that this is necessary to enable the Access Seeker to send or receive messages of any kind through any telecommunications network;
  - 33.3.3 disclose Access Seeker Information in accordance with and to the extent required by a reporting obligation under any applicable law;
  - 33.3.4 use Access Seeker Information in order to ensure compliance with non-discrimination or similar clauses in contracts between Chorus and Customers of Chorus provided that the Access Seeker and any Customer or End Users of the Access Seeker are not identified; and
  - 33.3.5 use Access Seeker Information for statistical purposes in fulfilment of legal or regulatory requirements, provided that the Access Seeker and any Customers or End Users of the Access Seeker are not identified.

### Defaults other than for Non-payment and Suspension of Supply

#### 34. Default Notice

- 34.1 Where on reasonable grounds a Party considers there has been a Default (other than a failure to pay any amount due under the UBA Terms), it may give Notice to the Party in Default setting out details of the Default and giving a reasonable period to remedy the Default, which must be at least 15 Working Days (**Default Notice**).
- 34.2 If a Dispute Notice is given in relation to the same subject matter as a Default Notice before the period to remedy the Default expires, then:

- 34.2.1 the status quo will prevail until the Dispute is resolved;
  - 34.2.2 if the Default Notice was given by Chorus, it will not give rise to any rights under clauses 35.5, 35.6, 36.5.4, or 36.5.5 unless and until the Dispute is resolved in Chorus' favour; and
  - 34.2.3 if the Default Notice was given by the Access Seeker, it will not give rise to any rights under clause 36.4 unless and until the Dispute is resolved in the Access Seeker's favour.
- 34.3 If a Dispute Notice is given in relation to the same subject matter as a Default Notice after the period to remedy the Default expires, then:
- 34.3.1 if the Default Notice was given by Chorus, it will give rise to rights under clauses 35.5, 35.6, 36.5.4, or 36.5.5 unless and until the Dispute is resolved in the Access Seeker's favour; and
  - 34.3.2 if the Default Notice was given by the Access Seeker, it will give rise to rights under clause 36.4 unless and until the Dispute is resolved in Chorus' favour.

### **35. Suspension of supply**

- 35.1 The Access Seeker remains liable to pay all Charges for the UBA Service (or part of the UBA Service) until the UBA Service is Suspended. The Access Seeker must pay all Charges for any part of the UBA Service the supply of which has not been Suspended, except to the extent that the Access Seeker is unable to use that part of the UBA Service as a result of the Suspension of another part of the UBA Service.
- 35.2 Acceptance of part payment or the continued supply of the UBA Service by Chorus, either before or after its powers to Suspend have become exercisable, does not constitute a waiver of Chorus' rights under this section 35.
- 35.3 Suspension of the UBA Service under this section 35 as a result of the Access Seeker's Default will cease as soon as it is reasonably practicable for Chorus to complete restoration of the UBA Service after the Default is remedied, and in any event must cease no later than four Working Days after the Access Seeker's Default is remedied.

#### **Suspension of supply following consultation and Default Notice**

- 35.4 Except in a case of an exceptional event making prior consultation impractical, before Chorus may exercise any right under clause 35.5:
  - 35.4.1 Chorus must give a Default Notice to the Access Seeker setting out the specific event giving rise to the Default Notice, any provisions of the Privacy Act 1993 or any relevant telecommunications privacy codes of practice which are relevant and any practicable process or outcome which would remove the necessity for Suspension;
  - 35.4.2 the Access Seeker and Chorus must promptly make themselves available for consultation and must promptly consult with each other with a view to

establishing a better understanding of the event and agreeing on a practical process or outcome which would remove the necessity for Suspension; and

- 35.4.3 five Working Days must have expired since Chorus made itself available for consultation with the Access Seeker, and the event which gave rise to the Default Notice must have continued throughout this period.
- 35.5 Chorus may Suspend supply of the UBA Service, but only to the minimum extent practical so as to limit disruption to services the Access Seeker provides to its Customers and End Users, if Chorus reasonably believes:
- 35.5.1 the Access Seeker does not hold a licence, permit or other official authorisation it must hold to provide its services lawfully;
- 35.5.2 the Access Seeker, in providing services that depend on the UBA Service, is breaching the Privacy Act 1993 or any relevant telecommunications privacy codes of practice in force under Part VI of the Privacy Act 1993;
- 35.5.3 any person to whom the Access Seeker is providing, or from whom the Access Seeker is receiving, a service in connection with the UBA Service is breaching the Privacy Act 1993 or any relevant telecommunications privacy codes of practice in force under the Privacy Act 1993; or
- 35.5.4 the Privacy Commissioner has performed a statutory function or exercised a statutory power which has or could have the effect of either making the operation of all or any part of the UBA Service impractical or detrimental to Chorus' reputation, or rendering Chorus incapable of performing an obligation relating to supply of the UBA Service.

#### **Suspension or restriction following Default Notice**

- 35.6 Where Chorus gives a Default Notice in respect of a material Default by the Access Seeker, Chorus may Suspend supply of the UBA Service or (where that Default affects only a part of the UBA Service) the relevant part of the UBA Service, after the period to remedy the material Default has expired if such Default has not been remedied.

#### **Immediate suspension or restriction**

- 35.7 Chorus may Suspend supply of the UBA Service or (if the relevant event affects only part of the UBA Service) the relevant part of the UBA Service, either immediately or within a reasonable period of time following the date on which the right to Suspend arises if:
- 35.7.1 the Access Seeker, in meeting its obligations, exercising its rights or using the UBA Service, endangers the health or safety of any person;
- 35.7.2 the prerequisites under section 6 have not been, or are no longer, satisfied by the Access Seeker;

- 35.7.3 any condition specified by Chorus under clause 36.6.3 has not been, or is no longer, satisfied by the Access Seeker;
- 35.7.4 any person to whom the Access Seeker is providing a service, that relies (in whole or in part) on the UBA Service is, in Chorus' reasonable opinion, using that service fraudulently or in breach of the UBA Terms, provided that Chorus will only Suspend the UBA Service to the minimum extent practicable to protect Chorus from the effects of that fraud or use in breach of the UBA Terms;
- 35.7.5 the Access Seeker's operation or conduct, in Chorus' reasonable opinion, interferes with, damages or threatens in any material way the operation of Chorus' Network;
- 35.7.6 the primary, or all, of the business activities of the Access Seeker are Suspended or cease for more than five consecutive Working Days;
- 35.7.7 the Access Seeker is unable to pay its debts as they fall due, or is presumed to be unable to pay its debts as they fall due, in terms of section 287 of the Companies Act 1993 (whether the Access Seeker is incorporated under that Act or not);
- 35.7.8 the Access Seeker goes into receivership or administration or has a receiver, trustee, administrator or statutory manager appointed in respect of all or any of its business or property;
- 35.7.9 the Access Seeker makes an assignment for the benefit of, or enters into or makes any arrangement or composition with, its creditors; or
- 35.7.10 any resolution is passed or any proceeding is commenced for the winding up or liquidation of the Access Seeker (whether on a voluntary or involuntary basis) without Chorus' prior written consent (which is not to be unreasonably withheld or delayed), and providing that if such a proceeding is commenced on an involuntary basis it has remained ongoing for 20 or more Working Days,

and Chorus must give Notice of such Suspension to the Access Seeker as soon as reasonably practicable.

#### **Obligation to inform the Commission**

- 35.8 If the supply of the UBA Service is Suspended under this section 35, Chorus must inform the Commission immediately of the Suspension and the reason for the Suspension.

## Termination of Supply

### 36. Termination of supply

- 36.1 The Access Seeker remains liable to pay all Charges for the UBA Service (or part of the UBA Service) until termination. The Access Seeker must pay all Charges for any part of the UBA Service the supply of which has not been terminated, except to the extent that the Access Seeker is unable to use a part of the UBA Service as a result of the termination of another part of the UBA Service.
- 36.2 Acceptance of part payment or the continued supply of the UBA Service by Chorus, either before or after its powers to terminate have become exercisable, does not constitute a waiver of Chorus' rights under this section 36.

### Termination of supply by the Access Seeker

- 36.3 The Access Seeker may terminate the UBA Service (or any part of the UBA Service) after giving Notice to Chorus of two months or more. If the Access Seeker gives Chorus any Notice under this clause 36.3, Chorus must terminate supply of the UBA Service in accordance with that Notice upon expiry of the Notice period.
- 36.4 Where the Access Seeker gives a Default Notice to Chorus, the Access Seeker may, after the period to remedy the Default has expired and provided that the Default has not been remedied, terminate supply of the UBA Service (or any part of the UBA Service) either:
- 36.4.1 immediately; or
  - 36.4.2 within a reasonable period of time following the date on which the Access Seeker becomes aware of the right to terminate.

### Termination of supply by Chorus

- 36.5 Chorus may on giving Notice to the Access Seeker, terminate supply of the UBA Service either immediately or within a reasonable period of time following the date on which the right to terminate arises if:
- 36.5.1 the Access Seeker goes into receivership or administration or has a receiver, trustee, administrator or statutory manager appointed in respect of all or any of its business or property;
  - 36.5.2 the Access Seeker makes an assignment for the benefit of, or enters into or makes any arrangement or composition with, its creditors;
  - 36.5.3 any resolution is passed or any proceeding is commenced for the winding up or liquidation of the Access Seeker (whether on a voluntary or involuntary basis) without Chorus' prior written consent (which is not to be unreasonably withheld or delayed), and providing that if such a proceeding is commenced on an involuntary basis it has remained ongoing for 20 or more Working Days;

36.5.4 Chorus has given a total of five or more Default Notices and/or Non-Payment Notices in any period of 12 months, provided that each Notice included in the total under this clause:

- (a) may have been in respect of the same or any different Default;
- (b) must not have been subject to a Dispute that was resolved in the Access Seeker's favour; and
- (c) must not have been subject to a determination by the Commission under the Act in the Access Seeker's favour.

36.5.5 Where Chorus gives a Default Notice to the Access Seeker, Chorus may, after the later of:

- (a) the period to remedy the Default has expired; and
- (b) three months from the date the Default Notice was given,  
  
terminate supply of the UBA Service (or any part of the UBA Service) either immediately or within a reasonable period of time following the date on which the Access Seeker becomes aware of the right to terminate, provided that:
- (c) the Default has not been remedied; and
- (d) the Default is material.

36.6 If supply of the UBA Service is terminated under clause 36.5, at its discretion, Chorus may:

- 36.6.1 refuse to recommence supply of the UBA Service to the Access Seeker;
- 36.6.2 agree to recommence supply of the UBA Service to the Access Seeker; or
- 36.6.3 agree to recommence supply of the UBA Service to the Access Seeker subject to any conditions, provided those conditions must not be inconsistent with the UBA Terms.

36.7 Upon termination of supply of the UBA Service, Chorus shall refund to the Access Seeker a pro rata proportion of all Charges which have been paid in advance by the Access Seeker for the period starting on the date of termination.

#### **Obligation to inform the Commission**

36.8 If the supply of the UBA Service is terminated under this section, Chorus must inform the Commission immediately of the termination and the reason for the termination.

## Disputes

### 37. Dispute resolution

#### General

37.1 Except as expressly provided under the UBA Terms or the Act, any dispute, disagreement, question or difference that arises between the Parties in relation to the UBA Terms (**Dispute**), must be resolved in accordance with this section 37.

#### Notice of Dispute

37.2 If a Dispute arises, either Party may give Notice to the other requiring that the Dispute be resolved in accordance with this section 37 (**Dispute Notice**). A Party's Dispute Notice must specify:

37.2.1 the nature of the Dispute;

37.2.2 its representative for negotiations under clause 37.4; and

37.2.3 its suggestion for settling the Dispute.

#### Response to Dispute Notice

37.3 A Party receiving a Dispute Notice must, within five Working Days of receipt, reply to the other Party by Notice in writing specifying:

37.3.1 its representative for negotiations under clause 37.4; and

37.3.2 its suggestion for settling the Dispute.

#### Negotiations

37.4 The Parties must enter into negotiations to resolve the Dispute within 10 Working Days of receiving the Dispute Notice. Negotiations must be held between a senior representative of each Party who must have authority to settle the Dispute. The senior representatives must endeavour to resolve the Dispute within 20 Working Days of receiving the Dispute Notice. If the senior representatives are not able to resolve the Dispute within 20 Working Days of receiving the Dispute Notice then the Dispute will be considered to have reached a deadlock (**Deadlock**).

#### Dispute resolution options where negotiations fail

37.5 If the Dispute reaches a Deadlock then:

37.5.1 the Parties must advise the Commission of the Dispute and the Deadlock;

37.5.2 the Parties may agree in writing to refer the Dispute to mediation in accordance with clause 37.6;

37.5.3 the Parties may agree in writing to refer the Dispute to expert decision in accordance with clause 37.7; or

- 37.5.4 either Party may refer the Dispute to arbitration in accordance with clause 37.8 (in the circumstances permitted under clause 37.8),

save that the Parties must refer any Invoice Error or Dispute of a technical, operational or implementation nature to expert decision in accordance with clause 37.7.

### Mediation

- 37.6 Where the Parties have agreed in writing to refer a Dispute that has reached a Deadlock to mediation (**Mediation Referral Agreement**), the following provisions will apply:

- 37.6.1 the mediator will be appointed by agreement between the Parties. However, if the Parties can not agree on a mediator within five Working Days of the Mediation Referral Agreement, then the mediator will be appointed at the written request of either Party by the president for the time being of LEADR NZ - Leading Edge Alternative Dispute Resolvers, New Zealand (or the president's nominee) or its successor body. The Party making this request must copy the request to the other Party;
- 37.6.2 unless the Parties agree otherwise in writing, the terms of reference for the mediation will be the model mediation terms suggested by LEADR NZ;
- 37.6.3 either Party may, by Notice to the other, revoke the Mediation Referral Agreement at any time; and
- 37.6.4 the Parties must advise the Commission if the mediation has lead to an agreement or if the Parties have ceased mediation without an agreement. If an agreement has been reached Parties must advise the Commission of the terms of the agreement.

### Expert Decision

- 37.7 Where the Parties must, or have agreed in writing to, refer a Dispute that has reached a Deadlock to expert decision (**Expert Referral Agreement**), the following provisions will apply:
- 37.7.1 the expert will be appointed by agreement between the Parties. However, if the Parties cannot agree on the expert within five Working Days of the Expert Referral Agreement, then an appropriately qualified and experienced expert will be appointed at the written request of either Party by the Chair of the Telecommunications Carriers' Forum. The Party making this request will use, and where possible ensure that the Chair of the Telecommunications Carriers' Forum uses, best endeavours to ensure that the appointment of the expert occurs no later than 15 Working Days from the date of the Expert Referral Agreement. The Party making this request must copy the request to the other Party;



- 37.7.2 to be eligible for appointment, the expert must be independent and impartial, experienced in the relevant area of telecommunications and will preferably be experienced in dispute resolution procedures. Unless the Parties agree otherwise, he or she must not have performed any duties, whether as an employee, consultant or contractor, for any of the Parties or any Related Company during a 12 month period prior to the date the Dispute Notice was given;
- 37.7.3 the expert may seek independent legal advice regarding the appropriate procedures for resolution of the Dispute;
- 37.7.4 the expert must adopt a procedure which, in the expert's opinion, is the most simple and expeditious procedure practicable in the circumstances;
- 37.7.5 the Parties will provide the expert with any information that the expert reasonably requires in a timely manner. The expert is entitled to make a decision in the absence of the information requested being provided, but subject to a reasonable time being given to the relevant Party to provide that information;
- 37.7.6 the expert will act as an expert and not as an Arbitrator under the Arbitration Act 1996. The expert will be entitled to rely on the expert's own judgement and opinion;
- 37.7.7 the expert should seek to make decisions that are timely, practical, efficient, and will take into account the Act, in particular the relevant standard access principles under the Act;
- 37.7.8 the expert will provide the Parties with a draft decision for comment prior to finalising it. The expert must provide the Parties with a reasonable period in which to comment on the draft decision and must take any comments received during that period into account in finalising a decision;
- 37.7.9 the expert must provide a decision (which must include reasons for that decision) to the Parties in writing as soon as reasonably practicable and, in the absence of manifest error or bad faith, that decision will be final and binding upon the Parties. Either Party has 10 Working Days from the date the decision is provided to assert that the expert's decision contains a manifest error or the expert has acted in bad faith;
- 37.7.10 the expert must use all reasonable endeavours to reach a final decision within 40 Working Days after appointment, and the Parties must co-operate reasonably with the expert to achieve that timetable;
- 37.7.11 except as set out in clause 37.7.12, the costs of the expert will be borne equally by the Parties. Each Party will bear its own costs in relation to the expert's decision;

- 37.7.12 where a Party has asserted that the expert's decision contains a manifest error or the expert has acted in bad faith, and such assertion is not upheld in that Party's favour by the relevant court or other authority (including the Commission), then the Party making the assertion will bear the costs (that is, all court or other authority costs) of both Parties; and
- 37.7.13 the Parties must advise the Commission if the expert has made a decision and if so the terms and reasons for that decision.

### Arbitration

37.8 If the Dispute reaches a Deadlock and the Parties:

37.8.1 have agreed to refer the Dispute to mediation and have not resolved the Dispute by the earlier of the conclusion of the mediation or the revoking of the Mediation Referral Agreement; or

37.8.2 have not agreed to refer the Dispute to mediation or expert decision,

then either Party may refer the Dispute to arbitration by a sole arbitrator (being a New Zealand resident) under the Arbitration Act 1996, by giving Notice to the other Party (**Arbitration Referral Notice**) and the following provisions will apply:

- 37.8.3 The arbitrator will be appointed by agreement between the Parties. However, if the Parties can not agree on an arbitrator within five Working Days of receipt of the Arbitration Referral Notice, the arbitrator will be appointed at the written request of either Party by the president for the time being of the New Zealand Law Society (or the president's nominee) or its successor body. The Party making this request must copy the request to the other Party.
- 37.8.4 The arbitration will take place in Auckland or Wellington (at the arbitrator's discretion).
- 37.8.5 The arbitrator must adopt a procedure which, in the arbitrator's opinion, is the most simple and expeditious procedure practicable in the circumstances.
- 37.8.6 The arbitrator may determine the Dispute without a hearing unless either Party gives Notice requiring one, in which case the arbitrator must treat that as a material consideration in assessing costs.
- 37.8.7 The Second Schedule of the Arbitration Act 1996 will apply.
- 37.8.8 The costs of the arbitrator will be borne equally by the Parties unless the arbitrator determines otherwise.
- 37.8.9 The Parties will co-operate to ensure the expeditious conduct of the arbitration. In particular, each Party will comply with any reasonable time

limits sought by the other for settling the terms of reference, interlocutory matters and all other steps preliminary and incidental to the hearing and decision of the Dispute.

37.8.10 The arbitrator must use all reasonable endeavours to reach a decision within 40 Working Days after appointment, and the Parties must co-operate reasonably with the arbitrator to achieve that timetable. In any event, the Dispute must be finally settled by the arbitrator within 60 Working Days after appointment, unless the Parties agree in writing to extend this period.

37.8.11 The Parties must advise the Commission if the arbitrator has made a decision and if so the terms and reasons for that decision.

### **Interlocutory or injunctive relief**

37.9 Nothing in this section 37 will prevent either Party from seeking urgent interlocutory or injunctive relief from the Court.

### **Good faith and continuity**

37.10 Pending resolution of any Dispute, the Access Seeker and Chorus will each:

37.10.1 make all reasonable efforts in good faith to resolve the Dispute promptly and in a manner which minimises any impact on the performance of the UBA Terms; and

37.10.2 continue to perform its other obligations under the UBA Terms.

### **Remedies under the Act**

37.11 A copy of any decision arising from a Dispute must be provided by the Parties to the Commission immediately following that decision. The Parties must indicate if any part of the decision is confidential. A copy of the decision will be published on the Commission's website as soon as practicable, subject to any restriction made by the Commission.

37.12 No Disputes as to the Charges listed in the UBA Price List may be resolved by the Disputes Resolution procedures in this section 37. The Access Seeker or Chorus (as the case may be) must apply to the Commission under the Act.

37.13 For the avoidance of doubt, nothing in this section 37 prevents the Access Seeker or Chorus from seeking any remedies available to it under the Act.

## **General**

### **38. Health and safety**

38.1 The Access Seeker and Chorus will comply with each other's reasonable requirements for security, health and safety when working at each other's premises. Chorus will also comply with any reasonable requirements for security, health and safety when working at the premises of a Customer or End User of the Access

Seeker. Where practicable, these requirements will be communicated to each other in writing.

### **39. Consumer Guarantees Act 1993**

- 39.1 The UBA Service is supplied to the Access Seeker for the purposes of a business as defined in the Consumer Guarantees Act 1993. The provisions of that Act do not apply to the UBA Service supplied to the Access Seeker under the UBA Terms.

### **40. Assignment**

- 40.1 The Access Seeker may transfer all of its rights and obligations (but not less than all) under the UBA Terms, provided that the assignee has satisfied the prerequisites set out in section 6.
- 40.2 Where the Access Seeker transfers its rights and obligations under the UBA Terms in accordance with clause 40.1, it must give prior Notice to Chorus of when that assignment will take effect.

### **41. Representations**

- 41.1 The Access Seeker may not represent, and will use all reasonable endeavours to ensure that its employees, contractors or agents do not represent, that there will be a continuing relationship between Chorus and any Customer or End User of the Access Seeker.

### **42. Subcontracting**

- 42.1 A Party may have subcontractors or other agents meet any of its obligations under the UBA Terms, but it will remain liable to the other Party for meeting all those obligations.

### **43. No waiver**

- 43.1 A waiver of any right, power or remedy under the UBA Terms must be in writing signed by the Party granting it. A waiver is only effective in relation to the particular obligation or Default in respect of which it is given. It is not to be taken as an implied waiver of any other obligation or Default or as an implied waiver of that obligation or Default in relation to any other occasion.
- 43.2 The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under the UBA Terms does not amount to a waiver.

### **44. Notices**

- 44.1 Notices to Chorus or the Access Seeker must be in writing and must be sent to the relevant contact details advised in accordance with the UBA Operations Manual.
- 44.2 Any Notice given by:

- 44.2.1 post to a contact address will be assumed to have been delivered three days after it is posted;
- 44.2.2 fax to a contact fax number will be assumed to have been delivered once a correct transmission confirmation slip is received, but any fax sent after 5.00 pm on a Working Day will be deemed to have been delivered at 9.00 am on the next Working Day;
- 44.2.3 email to an email address will be assumed to have been delivered on the earlier of:
  - (a) the sender's receipt of confirmation of successful delivery; or
  - (b) one Working Day after dispatch, provided the sender does not receive any indication of the failure of, or delay in, delivery within one Working Day after dispatch. For the purpose of this clause 44.2.3, 'dispatch' occurs when the relevant email first leaves the sender's network for delivery to the recipient's address.