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Submission on Consultation Paper on issues relating to proposed UBA changes

18 September 2014

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1. Summary

Introduction

1.1 We agree with and support the conclusion in the opinion that Chorus would be in breach of the STD. This submission supplements the good faith and s 18 approach in the opinion, by focussing on other grounds, particularly under the UBA STD Service Description rather than the STD General Terms, which is the focus of the opinion.

1.2 Providing external legal opinions for comment such as this continues to be a valuable approach, enabling a straw man for parties to address. Any issues raised in this submission should be seen in that context, even though it is unfortunate that the opinion does not deal with all substantive submissions and cross-submissions by the parties such as concessions by Chorus that would markedly change the conclusions. We explain below why this may have happened: in particular there may be a focus on the Spark complaint for which good faith in particular must be central. We suggest that Counsel revisit the position having regard to the other three objectives outlined below.

Why the focus on good faith and s 18?

1.3 For reasons that are difficult to discern, the opinion focusses on the good faith and s 18 terms in the STD. While that may be correct to deal with the Spark complaint, which is constrained as Boost is pre- Go Live, the focus on s 18 and good faith is not appropriate or necessary for the purpose of the opinion, said to be, by Counsel, to advise on the "legality of the **proposed** changes to the delivery of the regulated UBA services". (Highlighting added). The opinion answers that question by an unnecessarily complex and circuitous path.

1.4 A theme of this submission more generally is that:

(a) The focus of the opinion is unclear; and

(b) This highlights the need for clarity around approach.

1.5 There are simpler and less circuitous ways of handling these issues, based on answering the threshold question: *"Does the UBA STD service description permit what Chorus proposes or is currently doing?".* Properly analysed, the answer is no, which means that the STD would be breached.

1.6 Properly analysed also, that question usually has to be answered anyway under the good faith and s 18 approach. It is not necessary to get to good faith (with its added unnecessary complication of having to also show purpose) or to s 18 obligations, to decide the position when the answer to the threshold question of itself is enough. After all, if the service description allows the things of which the opinion says there is a good faith breach, there is in fact no good faith breach: Chorus would simply be acting legally within the STD no matter how ulterior its motive.

1.7 It is not apparent why the good faith and s 18 overlay are necessary. Plus, picking up an analogy from the Commerce Act, why have the extra hurdle of showing **purpose** (eg good faith breach which involves intention and purpose) when it is only necessary to show **effect** (eg Chorus is doing something the service description does not permit). Yet this seems to be the approach in the opinion. As noted above, the reason may be that the Commission and Counsel have in mind the Spark complaint where good faith is to the fore.

The Commission's objectives

1.8 It may be that this problem comes back to needing to have clarity around what the Commission is doing, and why. There appear to be four outcomes to be addressed, each with their own considerations to carefully consider:

(a) Dealing with the Spark complaint (which raises pre-Go Live issues). The Commission does not decide this issue, nor the issues at (c) and (d) below. The decision maker is the court.[1] The Commission only decides what to do about the complaint, such as whether to issue proceedings against Chorus. Essentially, the Commission is making decisions as to whether or not there are grounds to litigate, as it would under (c) and (d) below.

(b) Deciding the legal effect of the STD to enable decisions as to whether to have s 30R review. There is no point in doing such a review if the status quo already achieves what would be sought anyway; we don't agree that uncertainty, etc, points to the need for a s 30R review: properly analysed, there is no significant uncertainty.

(c) Providing assistance to the stakeholders, hopefully to expedite stakeholder decision making, by providing non-binding views on whether Boost and the changes to regulated UBA would be compliant. The Commission can do no more than provide non-binding indications.

(d) Likewise as to VDSL, as to whether Chorus must supply it as part of the regulated service already (the service introduced in 2013 is short of the

[1] Or, for parties, the arbitrator but that is not an issue for the Commission

full regulated service). (Related is the question of whether Chorus can withdraw the service).

1.9 As to (c) and (d) above we suggest below a workaround to enable the Commission to give guidance to stakeholders, while minimising risk.

Prioritisation and split handovers

1.10 As noted above, those issues, dealt with only briefly and as a side wind in the opinion, are at the centre of the analysis. The focus should be on them and not on the unduly circuitous and complex s 18 and good faith issues.

1.11 Properly analysed, Chorus would not be compliant as to prioritisation and split handovers if it rolled out Boost in its currently proposed form (which includes de-prioritising regulated UBA relative to Boost and it includes split handovers).

1.12 Also if properly analysed, the legal requirements as to prioritisation and split handovers are clear, contrary to what the opinion states. The opinion does not address the most relevant and decisive issues. A s 30R review is not necessary to clarify the position: it is clear enough as it is, and consistent also with policy objectives.

VDSL

1.13 The position as to VDSL, properly analysed, is also clear. It is clear that Chorus must supply VDSL, without the caveats it purported to impose in 2013. The 2010 Commission decisions are irrelevant as it is the court that decides not the Commission. So is the 2013 decision – understandably simply applying the 2010 decisions - to exclude VDSL benchmarks from the IPP pricing. The solution as to price is to include VDSL functionality as part of the UBA service being priced. The IPP does not need to be revisited.

1.14 A s 30R review is not necessary. The position is clear enough and it is consistent with policy objectives.

The detail

1.15 We turn now to the detail starting with clarifying the assumptions in the opinion (for example de-prioritisation would occur at multiple switches, not just one). References to clauses are to the STD UBA Service Description

2. Clarifying assumptions in the opinion

2.1 The assumptions relied on in the opinion, at [3] – [4], should be clarified as follows.

(a) We have recorded at [2] and [3.1] - [3.3] of our cross-submission what Chorus confirmed at the workshop. Regulated UBA won't just be de-prioritised at a single switch (the "first data switch" which in practice is the data switch at the handover) which the opinion assumes. It will be de-prioritised at multiple switches. This will escalate the overall impact of de-prioritisation of regulated UBA behind Boost traffic.

(b) As to Chorus' motivations at [4], this should be an "and/or" list. However, we note that the opinion appears aligned with our concern, as it identifies (at [10(a)]) that it would not be in good faith to weaken or undercut *"the regulated UBA service for the ulterior motive of making Boost services more attractive by comparison and migrating RSPs away from the*

regulated (price controlled) service"; the opinion then concludes, based on that, at [10] that the proposed changes:

(i) do not apply the STD in good faith; and

(ii) are, at least in part, an attempt to constrain the regulated UBA service in order to make commercial Boost more attractive.

(c) The opinion usefully identifies another assumption of significance at [10(f)(vi)]: switching to Boost by some RSPs may force others to switch too as de-prioritisation means further degradation of the regulated UBA service. This externality is particularly significant.

3. Focus

Introduction and overview of this section

3.1 The opinion, in pivoting around the good faith and s 18 provisions, has an unusual focus away from primary and simpler issues. Although not clear, it may be this is because of a focus on Spark's complaint, in the context of Boost not having gone live yet; therefore, for example, the good faith provisions have more significance. As Boost has not gone live, what can be complained about is curtailed.

3.2 While the opinion is not said to be limited in this way – it is expressly about the "legality of Chorus' proposed changes to the delivery of regulated UBA services"[2] - there may be a focus on what can currently be addressed under the Spark complaint.

3.3 In any event, the opinion is expressly focussed upon only changes to the regulated UBA service. Introduction of Boost is out of scope save to the extent Boost attenuates the regulated UBA service. The legality of Boost's introduction needs to be dealt with in any event. Plus there is the current breach of VDSL to be handled.

3.4 Whatever the reason for the approach, the opinion shows the need to be clear about what the Commission can and should do. As we outline below, the Commission's approach should be:

(a) To decide what to do about Spark's complaint (including whether to issue court proceedings as the court not the Commission is the ultimate decision maker);

(b) To assess the legal position as an input into a decision whether or not to commence a s 30R review; and

(c) To provide an early and non-binding indication as to how the Commission might handle a complaint should Boost be launched, in the hope that this shortens what is involved here. Again, this pivots around whether the Commission might launch court proceedings.

(d) To deal with the current apparent breach of the VDSL regulated UBA obligation, but on a non-binding basis as no complaint has yet been made.

[2] Opinion at [1]

3.5 Not being clear about the objectives leads to lack of clarity in the analysis.

Focus on s 18 and good faith

3.6 The legal opinion has a surprising primary focus on the good faith and s 18 provisions,[3] with only side-wind and brief reference to three of the other grounds on which Chorus may be breaching the STD.[4]

3.7 Good faith and s 18 are circuitous grounds for dealing with whether or not Chorus is or will act in breach of the STD. Those grounds can also be more challenging than simpler and stronger grounds. For example, a good faith argument, picking up Commerce Act language to illustrate, overlays the complications of proving Chorus' **purpose** on top of proving **effect**. Just as applies under the Commerce Act, proving purpose is often a significant hurdle (although we agree that, here, purpose in breach of the good faith provision can likely be shown).

3.8 The primary arguments against Chorus are simpler and stronger: as outlined below in more detail. Chorus has or will breach the STD by not supplying a service that complies with the STD service description. It is unduly circuitous and complicating to go down the good faith and s 18 paths.

Illustrating the flaw in the approach

3.9 The unnecessary complexity is illustrated by the following point. Almost always, if not always, a key ingredient in the question of whether there has been breach of the good faith obligation is the answer to a threshold question: *"Would what Chorus is doing, or proposes to do, breach any other provision of the STD including the service description?"* If the STD permits, for example, constraining of the regulated service, any steps to implement that outcome cannot be in breach of good faith. Chorus would simply be doing what it is entitled to do.

3.10 Only if the STD does not permit such constraints does the good faith question arise. But the answer to the threshold question (Is the approach permitted by, say, the service description?) is as far as one needs to go. If Chorus is not permitted by the service description to take the approach, that determines the issue. Good faith, with its purpose overlay, is an unnecessary additional step.

3.11 Materially, the same position applies as to the s 18 obligation. Materially, a key ingredient on s 18 questions is whether or not the STD permits the particular action (eg constraining throughput). Almost always, any breach question is answered by dealing only with that threshold question without having to move to the s 18 provision.[5]

3.12 We cannot understand therefore why there is so much focus on the good faith and s 18 provisions in the opinion, in which Counsel state that they are advising on "the legality of Chorus' **proposed** changes to the delivery of the regulated UBA services"[6] (highlighting added).

3.13 Given Boost has not gone live, we can see why, for the purposes of the Spark complaint, good faith and s 18 are a focus. . But that is the wrong focus for addressing the "legality of Chorus' proposed changes".

[3] Opinion at [5]
[4] Opinion at [11]
[5] As we have outlined earlier, use of s 18 to assist with interpretation is a different issue.
[6] Opinion at [1]

The Commission is not acting in judgment

3.14 The opinion also, again surprisingly, says at [11] that, given the answer on s 18 and good faith – that Chorus is in breach – it is not strictly necessary to address the other grounds.

3.15 Judges can- and do – take that approach. So could the Commission when making its ultimate decisions such as on STDs. But this is not like a judgment. Essentially, the Commission is deciding if there are grounds to take action in court against Chorus.[7] All potential grounds are relevant to that decision not just one. All grounds with reasonable prospects of success are relevant to the assessment. The assessment is like that of a plaintiff or prosecutor deciding whether to issue proceedings. Treating some grounds as not strictly necessary, and then dealing with them only briefly, is not the correct approach.

Lack of focus on submissions and cross submissions

3.16 The opinion, surprisingly, does not deal with a number of the parties' submissions and cross submissions including Chorus' significant concessions. That is unusual and unhelpful. It means that this opinion is not quite the straw man it could be. It also means that there are a number of errors in the opinion which would likely not have occurred had the opinion dealt with submissions and cross submissions.

Need for clarity

3.17 What emerges from the above is the need to have clarity as to **why** the Commission is considering these issues. The reasons why are:

(a) To decide what to do about Spark's complaint, including whether to bring proceedings in court against Chorus. The ultimate decision maker in this context is not the Commission: it is the court. The Commission's decision in this context is only about current breaches, and not future breaches (although current actions as to what Chorus will do in the future, such as steps before Boost's go live, can be in breach, as the opinion identifies).

(b) As an input into the decision as to whether to start a s 30R review. The status quo (materially, the legal effect of the STD) is relevant to that decision. For example, if the STD already achieves what might be decided on the s 30R review, there is no point in instigating that review.

(c) As an indication to stakeholders as to the Commission's possible approach if, for example, Boost does go live (for example, whether it might issue proceedings against Chorus if that happens). This will help stakeholders including Chorus decide what to do for the future and will potentially help speed up resolution. However, without a live product, and a complaint, the Commission can do no more than advance tentative views. Indeed, it must be careful not to make a definitive decision, for that can be attacked as pre-judgment. One way that the Commission can handle this is to, instead, provide a more definitive report on the legal implications as part of the analysis as to whether or not to instigate a s 30R review (see (b) above). That will make the likely approach on a complaint, if Boost goes live, clear enough.

[7] As outlined below there are subsidiary considerations under s 30R and also as to outlining more broadly the Commission's position.

(d) As an indication of the Commission's possible approach if it now receives a complaint in relation to the failure to provide regulated VDSL on STD terms. Although that is a current breach, the Commission's views would need to be tentative, pending a relevant complaint under the Act. To do otherwise would be pre-judgment, although, again, a view on the legal position for s 30R may provide a pragmatic low risk way forward.

Our approach in this submission

3.18 In this submission, we focus not on the Spark complaint, but on the broader issues around whether:

(a) in the currently proposed form, the roll out of Boost, and its impact on regulated UBA, would breach the STD;

(b) whether failure to supply VDSL as a regulated service on STD terms (and its proposed withdrawal) complies with the STD.

3.19 It will be important for the Commission to carefully separate its approach, including dealing with the parties' submissions, under the 4 categories above.

3.20 We turn now to the three issues raised as side issues: prioritisation, split handovers and VDSL.

4. Prioritisation and split handover points

4.1 The opinion only briefly deals with what it describes as "prioritisation" at [12(b)], as one of the three additional issues.

4.2 There is, in the opinion:

(a) incorrect conflation of the issues, particularly conflation as between (i) prioritisation and (ii) handover points for regulated UBA and Boost respectively and

(b) An incorrect application of the technical aspects of the network, and in turn the legal implications.

4.3 There are two key traffic management features, as explained by Chorus at the last workshop, that are relevant (as explained in our cross submission):

(a) At all switches, not just the switch at the handover point, regulated UBA traffic is de-prioritised behind Boost traffic (which happens of course when more traffic is presented than can be handled by that switch).[8]

(b) A separate feature is that regulated UBA traffic and Boost traffic is to be handed over at the handover point via two different handovers. This enables the throttling of regulated UBA traffic to 300 kbps. This is explained in the whiteboard diagram prepared by Chorus at the workshop. (See Para 2.3 of our cross submission).

4.4 Counsel seem to treat the split handovers as a prioritisation issue. In a sense that might be so, given the effect of splitting the paths of Boost and regulated UBA at the handover point is to prioritise Boost over regulated UBA. But this is not the same thing that is normally called "prioritisation" nor is it what network

[8] Chorus said at the workshop this was all switches but it is possible there is no de-prioritisation at the switch at the handover point: but that makes no difference to the applicable legal issues

people call prioritisation. In the latter instance, if the combined Boost and regulated UBA presenting at a switch exceeds its capacity, the Boost traffic is prioritised ahead of regulated UBA traffic. We will call that "prioritisation" and we will call the "split handovers" just that.

Split handovers

4.5 As to that last point – split handovers for Boost and regulated UBA – the opinion notes the cl 3.25 requirement that regulated UBA traffic will not be distinguishable from other traffic supplied at the same handover point. We have submitted and cross submitted that this means there cannot be split handovers for regulated UBA and Boost and therefore there cannot be throttling of regulated UBA relative to Boost and in fact there can be no throttling at all).[9]

4.6 The view about no split handovers is shared, it seems, by Counsel, save that they briefly state, without developing reasons, that they have difficulty in reconciling that cl 3.25 with:

(a) Contrasting wording in cl 4.26.

(b) Actual industry practice; and

(c) The Commission's previous acceptance in a Unbundled Bitstream Service (UBS) decision that giving some traffic higher priority is unobjectionable;

4.7 Dealing with each of those three points in turn, to demonstrate that there are not the problems briefly stated by counsel:

(a) Clause 4.26 provides that internet class of service for EUBA (that is normal internet traffic under EUBA not the real time traffic) *"will not be distinguishable from the Unbundled Bitstream Service traffic supplied at the same Handover Point".* This in no way affects the application of cl 3.25:

(i) The Unbundled Bitstream Service (UBS) is the bitstream service that was replaced by UBA in 2007. It is no longer sold. Clause 4.26 is therefore now irrelevant and does not impact management of the services or interpretation of cl 3.25.

(ii) In any event, normal BUBA traffic (aka EUBA0 where there is no ATM) is to be handled in just the same way as the internet class of service for EUBA. The effect of cl 3.25 is to require this. There is nothing to be reconciled as between cl 3.25 and cl 4.26.

(b) To the second point, Counsel do not explain what they mean by 'actual industry practice'. It may be this relates to the prioritisation, ahead of regulated UBA, of the real time component of EUBA40/90 and HSNS. It may also relate to ATM based UBA being constrained to low speeds. It may be being said that, because there is already differential treatment of other services, there can be prioritisation of Boost ahead of regulated UBA. That does not follow:

[9] Counsel frame this as prioritisation and it is a different form of prioritisation, the regulated UBA handover being throttled at 300 kbps and the Boost handover being dimensioned at a much faster handover.

(i) As to HSNS and EUBA 40 and 90, see [3.4] and [3.5] in our cross-submission.

(ii) As to ATM, it is recognised that the performance must be managed due to ATM network issues. This is provided for in cl 3.7 and 3.8.

(iii) The position as to HSNS, EUBA40/90 and ATM do not justify any prioritisation or different handover points.

(c) To the third point, as to the Commission's apparent previous acceptance of prioritisation:

(i) That is legally irrelevant. The decision maker is the court not the Commission. It is unfortunate that the opinion has not made this point clearly, it having been squarely made in submissions and cross submissions. The opinion incorrectly weaves into the approach an irrelevant legal consideration as though it is a legal consideration. It does the same thing in relation to VDSL.

(ii) In any event, as noted in relation to HSNS, EUBA40/90 and ATM, any such prioritisation does not justify the proposals as to Boost.

Prioritisation

4.8 This seems to be one of the three side issues and is dealt with, as "network management" at [12a]. The treatment is incomplete. However the appropriate clauses in the service description are correctly identified, save that cl 4.13 seems irrelevant. The reasons why, under those clauses, the regulated UBA service cannot be deprioritised behind Boost are set out in detail in our submissions and cross submissions.

Counsel's views on prioritisation and split handovers

4.9 The opinion is incorrect in observing, at [12], that the issues as to prioritisation and split handover points are not expressly addressed and so it is difficult to determine the correct legal position with any degree of certainty. When the correct facts and law are focussed upon, the position becomes clear.

4.10 For that reason also, it is not necessary to do a s 30R review because of perceived uncertainties, as outlined in the opinion.[10] The position is clear. The problem is that the opinion does not address all relevant matters.

5. VDSL

5.1 We agree with the reasons for the conclusions in the opinion [11] that VDSL must be supplied as part of the regulated service, in relation to VDSL-capable DSLAMs. But the opinion reaches this conclusion by a more circuitous path than is necessary and even ignores key concessions made by Chorus. Despite Counsel having the parties' submissions and cross submissions available to them, they have inexplicably not dealt with those submissions and therefore focussed incorrectly.

5.2 That is the danger of undertaking a straw man opinion such as this, without having regard to what Counsel have available to them. While from a public law

[10] Opinion at [13]
[11] At [12(c)]

perspective, that, in isolation, may be something that is not legally problematic, it is something that the Commission would need to remedy, one way or another, in its decision making process.

5.3 We refer to our submission and cross-submission for the detailed position and reasons why VDSL is a regulated UBA service despite the Commission's 2010 decisions.

5.4 To take an example of the problem with the opinion, Counsel deal only with cl 3.6 when, as Chorus has shown, cl 3.7 is the central provision. In particular it is surprising that the opinion does not address the concession made by Chorus in its submissions at [B38]:

> "Chorus of course accepts, as is implicit in cl 3.7, that the "*maximum upstream or downstream line speed*" is the "*maximum … line speed for data traffic that the DSLAM can support*" subject to the constraints set out in cls 3.7 and 3.8"

5.5 That is, in plain and uncontroversial language, a requirement that VDSL is provided when there is a VDSL option in the DSLAM (mostly, that is the case). Otherwise the clause would have stated something like *"the maximum…line speed… that the [ADSL2 card] can support".*

5.6 The point is reinforced by the only relevant carve out. Clause 3.8.5 provides that the FS/FS obligation is only materially limited by *"the performance capability of the DSLAM".* The VDSL card is part of the DSLAM's *"performance capability".*

5.7 While the opinion's reference to the reasons for the STD is useful in showing why VDSL should be part of the regulated service, it is also of limited relevance given the clarity of the service description.

The VDSL position is clear, contrary to the opinion's conclusions

5.8 As to VDSL, the opinion is incorrect in observing, at [12], that the issues are not expressly addressed and so it is difficult to determine the correct legal position with any degree of certainty. When the correct provisions in the STD are focussed upon – in particular cl 3.7 and 3.8 and not just cl 3.6 - the position becomes clear.

5.9 For that reason also, it is not necessary to do a s 30R review because of perceived uncertainties, as outlined in the opinion.[12] The position is clear, and that is so even if interpretation tools need to be used. The problem is that the opinion does not address all relevant matters.

2010 and 2013 Commission VDSL decisions

5.10 The errors by the Commission as to VDSL in 2010 are irrelevant, as the court not the Commission is the ultimate decision maker. What happens in another forum is not binding on the court.

5.11 The 2013 UBA IPP benchmarking decision, made on the assumption that VDSL is not part of the regulated service, is not so much an original error as it is simply applying – understandably - the incorrect 2010 decisions. The fact that the IPP UBA decision was incorrect in excluding VDSL price points does not change

[12] Opinion at [13]

things in relation to the issues under review here. That is a separate process and is irrelevant to the decision by the court. The error can be corrected in the FPP process. VDSL should be included in the modelling as a regulated service. There is no need or legal basis for revisiting the IPP.

The 2013 inclusion of VDSL in regulated UBA

5.12 In 2013, Chorus purported to roll VDSL into the regulated service on terms that differ from the STD. For example, Chorus' terms include the right to pull out the VDSL service as UFB rolls out over the VDSL footprint.

5.13 However, Chorus must supply VDSL on the terms in the STD, without such caveats. It must also now take steps to fix the breaches such as by confirming that the service is not subject to such caveats.

5.14 What is clear is that Chorus cannot withdraw the service.

Section 30R review as to VDSL?

5.15 It is not necessary to do a s 30R review as to VDSL being a regulated service. The basis for its inclusion in the STD, and the terms for its supply, are clear enough. Moreover, the current position is consistent with the Commission's decisions documents including the extract from Decision 582 quoted in the opinion at [12(c)].

6. Investment in the network

6.1 The opinion has a useful summary of issues relating to on-going investment obligations. Both IPP and FPP prices will reflect future investment requirements having regard to expected performance of regulated UBA over time. We consider that a decision that the STD will be breached if Boost is rolled out in its current form can be made without regard to future investment requirements. However, we expect a correct interpretation of the STD would conclude that ongoing investment is required by the STD, having regard to the STD, the underlying decision and context including s 18.