

# Memorandum

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## **CHORUS: PROPOSED CHANGES TO UNBUNDLED BITSTREAM ACCESS SERVICE - REVIEW OF COMMERCE COMMISSION LEGAL ADVICE**

### **Introduction**

- 1 On 4 September 2014 the Commerce Commission issued a paper entitled *Consultation paper on issues relating to Chorus' proposed changes to the UBA service (the Consultation Paper)*. This attached written legal advice obtained by the Commission from two Wellington barristers, David Laurenson QC and James Every-Palmer, dated 3 September 2014 (the *Advice*). The Consultation Paper sought responses to the Advice by 18 September 2014. In turn, Chorus has sought our views on the Advice.
- 2 Chorus' proposed changes involve providing unbundled bitstream access (*UBA*) services in two forms:
  - 2.1 "**RUBA**" services - the existing regulated services provided by Chorus in fulfilment of its obligations under the Telecommunications Act 2001 (the *Act*) and the Commission's UBA Standard Terms Determination (*STD*). It is currently proposed that Chorus will introduce traffic management to the RUBA services with the effect that RUBA services achieve an average throughput metric of 300 kpbs and a peak rate of the Full Speed/Full Speed line speed; and
  - 2.2 "**Boost**" services- new commercial (unregulated) services, with a significantly higher (and guaranteed) throughput (as explained further below), and otherwise differentiated by additional enhancements and higher prices, including utilisation of VDSL technology.
- 3 For the reasons explained in what follows, our view is that the Advice incorporates important flaws in its analysis which lead to its erroneous conclusion (at paragraph [10]) that:

Chorus' proposed changes would likely breach clause 2.2.1 of the UBA General Terms.

- 4 Clause 2.2.1 of the UBA General Terms provides that the parties to the December 2007 UBA STD must carry out their obligations under the UBA Terms in good faith and in furtherance of the purposes set out in s 18 of the Act. (Section 18 and Clause 2 are reproduced in the attached **Appendix A**, for convenience).
- 5 In particular, but as elaborated in more detail later:
- 5.1 the s 18 purposes relate to general concepts such as “competition”, “efficiencies” and “incentives” which must inform the Commission’s decision-making but cannot translate directly into entitlements or obligations applicable to STD parties;
  - 5.2 the Act requires an STD to “specify” (i.e. clearly identify) the terms of supply of the regulated service, and this requirement is not satisfied by inferring or implying obligations not made explicit in the STD’s text;
  - 5.3 the Act also contemplates that designated services may be supplied on a contractual basis, notwithstanding the existence of a relevant STD – and so does the UBA STD in its recognition of current and future UBA variants;
  - 5.4 the UBA STD is extremely detailed and contains no specified constraint on Chorus’ proposed changes;
  - 5.5 insofar as the Advice relies on the “good faith” reference in clause 2.2.1, it is unsound: that reference primarily foreshadows some 30 or more detailed cooperation and similar requirements that are specified throughout the UBA Terms; and, in this context, “good faith” can mean no more than honest cooperation in relation to the defined “UBA Service”;
  - 5.6 the proposed changes by Chorus are consistent with the UBA Service definition: the specified minimum throughput is maintained, and the maximum line speed is unaffected;
  - 5.7 the Advice effectively contends for an extraordinary implied obligation on Chorus of maximised performance which has no foundation in the UBA Terms, and which is contrary to the express performance standards contained in those Terms.

**Statutory context**

- 6 The “UBA General Terms” form Appendix A to the Commission’s Decision 611 (dated 12 December 2007), *Standard Terms Determination for the designated service Telecom’s [now Chorus’] unbundled bitstream access service (UBA STD)*. The UBA Terms have been amended and clarified from time to time since 2007, and are now published by the Commission in their consolidated form as at 30 November 2011.
- 7 The UBA STD comprises:
- 7.1 UBA General Terms (50 pp);
  - 7.2 Schedule 1: UBA Service Description (11 pp);

- 7.3 Schedule 2: UBA Price List (17 pp);
- 7.4 Schedule 3: UBA Service Level Terms (18 pp);
- 7.5 Schedule 4: UBA Operations Manual (70 pp).
- 8 In other words, the UBA STD together with the 87 pages of Decision 611 itself involves over 250 pages of text regulating, in considerable detail, the provision of the designated UBA service provided by (now) Chorus.
- 9 The regulatory regime established under Part 2 of the Act provides for there to be regulated supply of certain telecommunications services between service providers (s 18(1)), including the “designated access services” described in Part 2(1) of Schedule 1 (s 4(b)). Such designated services include Chorus’ UBA service.
- 10 The provisions of such services on regulated terms may result from a Commission determination on an access seeker’s application (ss 20-30: Subpart 2) or, alternatively, on “standard terms” (ss 30A-30ZD: Subpart 2A).
- 11 The rationale for a “standard terms determination” is that it will specify sufficient terms and conditions to enable the access seeker to be provided with the relevant service without it needing to apply for a specific determination (under Subpart 2) nor enter into an agreement with the access provider: s 30O(1), also reproduced in Appendix A.
- 12 The phrase “must specify” dominates s 30O(1). It is evidently used in its orthodox sense of “identify clearly and definitely”.<sup>1</sup> This reinforces the relevant statutory purpose: that the STD will be essentially self-contained as a prescription of the rights and obligations of both the access seeker and the access provider. Given the sanctions for breach of an STD, discussed below, this is also consistent with the rule of law principle that parties should be able to appreciate in advance the extent of such obligations.<sup>2</sup>
- 13 Further, the STD must (s 30G(1)(c)) be consistent with the standard access principles set out in Schedule 1(1), clause 5 (subject to the clause 6 limits). These principles are plainly designed to ensure that “the service” whose supply is regulated is in fact supplied in no lesser form than if the access provider were supplying itself (as to timeliness, international best practice, non-price terms and available information).
- 14 However, Subpart 2A does contemplate that, notwithstanding the existence of a relevant STD, there may be a subsequent contractual supply of such services: s 30S(2). In other words, as might be expected, the STD provides an available regulated form of the service but does not prohibit a contractual supply of the designated access service (which, as a matter of commercial reality, would very likely include some enhancements compared to the regulated form).

<sup>1</sup> See, e.g., *Concise Oxford English Dictionary* (10<sup>th</sup> ed, 2002) at p1378.

<sup>2</sup> See Tom Bingham, *The Rule of Law* (2010) at p37; Oliver Jones, *Bennion on Statutory Interpretation* (6<sup>th</sup> ed, 2006) §271 at p749.

- 15 Where an access seeker does take the regulated services under an STD, the access provider must provide that service in compliance with the detailed terms of the STD: s 30S(1) and (3).
- 16 Further, and importantly, as an STD is an “enforceable matter” under s 156N, that supply obligation is expressly enforceable by pecuniary penalties under Part 4A(2) of the Act.
- 17 There is express scope for the Commission to review an STD, on the Commission’s initiative and after consultation, under s 30R. However, in relation to the UBA STD, no s 30R review may commence prior to 1 December 2014: Telecommunications (TSO, Broadband, and Other Matters) Amendment Act 2011, s 76(a).

**Interpretation of an STD**

- 18 As an instrument created and enforced under statute by a statutory body, an STD is to be interpreted in accordance with the orthodox principle that its meaning is to be ascertained from its text and in the light of its purpose.<sup>3</sup> This requires an objective approach to interpretation, having particular regard to the structure of the instrument and the operative language employed.
- 19 Conversely, a regulatory instrument is *not* a consensual document. It does *not* involve any moral imperative to honour a bargain voluntarily entered into. Rather, it involves an external imposition of governmental constraints, enforced by penal provisions, on the regulated party’s common law entitlement to undertake business only on terms it agrees to.
- 20 Accordingly, as elaborated later, there is a need for considerable caution in attempting to translate concepts and principles from the world of contractual interpretation into that of regulatory instruments.

**The UBA STD**

- 21 The extent of the UBA STD defeats any sensible attempt at summary, but a number of its features may be noted for present purposes.

**- Detailed and complete**

- 22 First, as noted earlier, the UBA STD is remarkably detailed – over 250 pages of text, or over 160 pages excluding Decision 611 itself. This is of course consistent with the “ready to go” expectations of specifying “standard terms”: s 30O(1). But it is inconsistent with any contention that some fundamental requirements or obligations not otherwise captured in this voluminous detail must be *implied* into the STD.
- 23 The intended comprehensive and self-contained nature of the STD is not only inherent in the “specify” requirement at s 30O(1), as noted earlier, but reinforced by clause 5.1 of the STD General Terms. This states that the UBA Terms (the General Terms plus Schedules) “are all of the terms on which Chorus will make the UBA Service available to the Access Seeker”. The “UBA Service” is defined in terms of its description in Schedule 1 (UBA Service Description).

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<sup>3</sup> This familiar principle is enshrined, in relation to enactments and regulations, by s 5 of the Interpretation Act 1999. That provision applies to the UBA STD as a “regulation” by virtue of s 29 of the 1999 Act.

**- Multiple variants of the service**

- 24 At least two varieties of this UBA Service are expressly provided for – Basic UBA, and Enhanced UBA: STD, Schedule 1, Sections 3 and 4. Each of Basic and Enhanced UBA are subject to specific “metrics” to be achieved. Those metrics include, for BUBA (at cl 3.12), a:

99.9% probability of providing to any provisioned End User a minimum uplink and downlink average throughput of 32 kbps during any 15 minute period on demand.

- 25 Similarly, the service description for the EUBA services includes (cl 4.10):

Metric	Notes	Real time CoS (200 byte packet)	Internet CoS (1500 byte packet)
Throughput	kbit/s	= 40kbit/s or 90 kbit/s or 180kbit/s	99.9% probability of providing to any provisioned End User a minimum uplink and downlink average throughput of 32kbps during any 15 minute period on demand

- 26 “Throughput” is explained in this context by authoritative literature.<sup>4</sup> It refers to the actual amount of useful and non-redundant information which is transmitted or processed over a UBA service. In other words, the actual amount of data received in a particular period, taking into account all matters including end-user application usage, contention and the presence of other services on the network. This will be no greater than the line speed, but will vary over time, depending in particular on end-user application usage and contention, and on average will be a fraction of the line speed. For example, if a user is browsing web pages, when a page is requested a burst of data for the page will be sent at speeds approaching line speed, but then while the user is actually reading the page no data is sent. The average throughput (as specified in the STD) of the service as a result of this usage is a fraction of the line speed.

- 27 The STD Service Description deals separately with “line speed”. Thus, in clause 3.6 it is provided that:

The Basic UBA Service available under this service description is a DSL enabled service which has a maximum downstream line speed for data traffic sent to the End User and a maximum upstream line speed for data traffic sent from the End User.

- 28 Here, “line speed” refers to the maximum number of bits that can be transmitted over a line in a defined time or, in other words, the maximum speed of the data connection between the end-user modem and DSLAM.<sup>5</sup> As the context for the use of that term in clause 3.6 makes plain, it is a description of the maximum speed at which the DSLAM and the end-user equipment may communicate. The end-user can

<sup>4</sup> *Newtons Telecommunications Dictionary* (27<sup>th</sup> ed, 2013) at p1189. See also Ofcom *Voluntary Code of Practice: Broadband Speeds* (2010) (<http://stakeholders.ofcom.org.uk/telecoms/codes-of-practice/broadband-speeds-cop-2010/code-of-practice/>).

<sup>5</sup> *Newtons Telecommunications Dictionary* (27<sup>th</sup> ed, 2013) at p710. See also Ofcom *Voluntary Code of Practice: Broadband Speeds* (2010) (<http://stakeholders.ofcom.org.uk/telecoms/codes-of-practice/broadband-speeds-cop-2010/code-of-practice/>).

never receive information at a rate faster than the line speed. It is not, however, a guarantee that that speed will be achieved at all times irrespective of the other services or users using the network.

29 As noted earlier, under the changes to the delivery of the RUBA services proposed by Chorus:

29.1 the RUBA services will continue to provide a guaranteed throughput substantially higher than the minimum 32 kbps specified in the UBA Service Description: UBA Terms, Schedule 1, clauses 3.12 and 4.10; and

29.2 the RUBA services' line speed will remain at the maximum level for the technology deployed.

**- Differentiated contractual offerings**

30 Further, the General Terms contemplate additional UBA Service "variants": STD, General Terms, clauses 10.1-10.3. These clauses require prior notice (a minimum of 20 working days) of any new variant, and provision of a sensible service description (including price). However, the Terms do *not* deem any such variant to be within the STD or automatically subject to regulation. Rather, the Commission "*may* exercise its powers under the Act ... to amend the UBA Terms". If the Commission does not exercise such powers,<sup>6</sup> the variant becomes a *contractual* offering - as occurred in relation to Telecom's VDSL2 Service.

31 In its final VDSL2 decision, dated 20 December 2010, the Commission considered that WVS, a service involving more onerous obligations on the access provider, was thereby differentiated from the regulated service. At paragraph 5 of its decision, the Commission stated:

The Commission has ... concluded that WVS incorporates a number of features not included in the regulated UBA Service Description. These features include an increase in the minimum average throughput from 32 kbps to 96 kbps, and a warranty from Telecom that the minimum line speed thresholds will be 15Mbps download and 5Mbps upload, with compensation payable in the event this standard is not met. In the Commission's view these more onerous obligations on Telecom are sufficient to differentiate WVS from the regulated UBA service.

32 The point was reinforced at paragraph 12:

Submitters suggested that higher throughput metrics alone were not a sufficient differentiator from UBA. The Commission does not agree. The UBA Service Description specifies 32 kbps as a minimum, compared with 96 kbps for WVS. Currently Telecom is providing an average throughput of 45 kbps for the regulated UBA service, which is well above the minimum required, but significantly below the level required under WVS. The more onerous throughput obligation applying to WVS is sufficient to differentiate it from the regulated service.

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<sup>6</sup> Whether by way of review under s 30R of the Act, or clarification under s 58 of the Act.

**- Technological neutrality**

33 The STD is technologically neutral, as is the Act's service description. UBA is a "DSL enabled service", where "DSL" merely means Digital Subscriber Line: STD, Schedule 1, clauses 1.3 and 2.2. There is no further prescription of the technology which Chorus must use to provide UBA to all or any access seekers. In other words, Chorus' choice of technology is *not* constrained by the STD.

**- Co-operation, reasonable endeavours, good faith**

34 A feature of the UBA Terms as a whole is an emphasis on cooperation and reasonable conduct by and between the access seeker and the access provider to ensure proper delivery and acceptance of the UBA Service.

35 In **Appendix B** attached to this memorandum, we note more than 30 provisions in the General Terms and Schedules which specify requirements for cooperation and/or reasonable conduct. In several of those provisions, the term "good faith" is used.

**Clause 2 of the UBA General Terms**

36 Clause 2 of the UBA General Terms is reproduced in Appendix A to this memorandum. It prefaces the very detailed provisions that follow – in the General Terms and the Schedules – by reference to the context and, as the heading states, "guiding principles". In particular, there is reference to:

36.1 the Commission's Decision 611;

36.2 the purposes of the Act, in particular as set out in s 18;

36.3 carrying out obligations under the UBA Terms in good faith;

36.4 the doing of things necessary to give full effect to the UBA Terms;

36.5 the standard access principles in Schedule 1 of the Act.

37 There is an understandable degree of rhetoric in clause 2. Decision 611 does provide context. However, as previously noted, the requirement of s 300 of the Act is that the STD "specify" what the parties must do, and under the shadow of penal sanctions. The UBA Terms not only provide such specification in very great detail, but expressly provide that they are "all of the terms" (General Terms, clause 5.1).

38 The clause 2.3 reference to the Act's standard access terms merely states what the Act requires in relation to all designated access services. And the clause 2.2.1 reference to access seekers and access providers acting in furtherance of s 18 purposes cannot create any specific obligation on such parties. The s 18 purposes relate to the general policy concepts of competition, efficiency and investment incentives. These are matters which the Commission is required to promote in its determinations (s 19), but that cannot be somehow delegated to access seekers or providers.

39 In this general context, and the numerous provisions summarised in our Appendix B, the brief reference in clause 2 to "good faith" and "all things reasonably necessary" are best construed as foreshadowing and shortly summarising those specific

provisions. In other words, those brief references provide a preamble to the operative and substantive provisions to follow, and are to be read as being given effect to primarily through those provisions.

- 40 Further, using “good faith” in a common usage sense, the specific UBA Terms provisions make good sense. Thus, the online *Oxford English Dictionary* explains “faith” in terms of “fulfilment of a trust or promise”, and “bad faith” and “bona fides” in terms of an “intent to deceive” (or not).<sup>7</sup> Such matters are entirely consistent with both the standard access principles and the provisions summarised in Appendix B.

**“Good faith”: assuming a contractual analogy**

- 41 The use of “good faith” in this regulatory context is presumably an attempt to reinforce an analogy between a regulated supply and a contractual (or otherwise consensual) supply. As previously noted, the analogy is problematic because consensual arrangements involve radically different motivations, moral imperatives and sanctions.
- 42 However, insofar as the analogy may be used, the concept of “good faith” has a limited role in contract law and interpretation in New Zealand. It is not a standalone general principle, nor a generally implied term, but is reflected in specific aspects of contract law. Insofar as it is the antithesis of “bad faith”, it may be reflected in contractual circumstances involving gross imbalances of bargaining power (duress), or of information (misrepresentation), or contractual power (capricious use of powers).<sup>8</sup>
- 43 Further, and even in US jurisdictions where good faith is a general contractual principle, its role is supportive, not originating. Thus good faith cannot be used to inject substantive terms into a contract nor to contradict an express provision. Rather it protects the performance of express provisions, and expectations of cooperation and reasonable conduct, from being undermined by unilateral conduct.<sup>9</sup>

**The Advice to the Commerce Commission**

- 44 All of the matters traversed above add up to a profound contradiction of the Advice. Clause 2.2.1 and its reference to “good faith” cannot sensibly be construed, in its immediate (UBA Terms) and wider (s 300 of the Act) context as creating what are effectively additional standalone obligations or constraints *requiring* that the regulated service must evolve and deploy best available technology, and prohibiting Chorus from offering a differentiated contractual variant.
- 45 That is particularly so where those standalone obligations contradict the specific provisions of the UBA Terms in relation to technology, service specification, and the offering of differentiate contractual variants.

<sup>7</sup> See <<http://www.oed.com>>.

<sup>8</sup> See generally Burrows Finn and Todd, *Law of Contract in New Zealand* (4<sup>th</sup> ed, 2012) paras 2.2.6 and 6.3.3.

<sup>9</sup> See generally 17A *American Jurisprudence (2d)*, “Contracts”, para 370, on implied obligations of good faith, fair dealing and cooperation.



46 A more specific response to the Advice is contained in **Appendix C** attached to this advice.

**Further advice**

47 We would be happy to discuss this advice with you, or to elaborate on any aspect of it, if that would provide assistance.



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**APPENDIX A: RELEVANT PROVISIONS OF THE TELECOMMUNICATIONS ACT 2001 AND UBA STD**

A.1 Section 18 of the Telecommunications Act 2001 provides:

**18 Purpose**

- (1) The purpose of this Part and Schedules 1 to 3 is to promote competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand by regulating, and providing for the regulation of, the supply of certain telecommunications services between service providers.
- (2) In determining whether or not, or the extent to which, any act or omission will result, or will be likely to result, in competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand, the efficiencies that will result, or will be likely to result, from that act or omission must be considered.
- [(2A) To avoid doubt, in determining whether or not, or the extent to which, competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand is promoted, consideration must be given to the incentives to innovate that exist for, and the risks faced by, investors in new telecommunications services that involve significant capital investment and that offer capabilities not available from established services.]
- (3) Except as otherwise expressly provided, nothing in this Act limits the application of this section.
- (4) Subsection (3) is for the avoidance of doubt.

A.2 Section 300 of the Telecommunications Act 2001 provides:

**300 Matters to be included in standard terms determination: general**

- (1) A standard terms determination must-
  - (a) specify sufficient terms to allow, without the need for the access seeker to enter into an agreement with the access provider, the designated access service or specified service to be made available within the time frames specified under paragraph (b); and
  - (b) state the time frames within which the access provider must make the service available to-
    - (i) every person who is already an access seeker when the standard terms determination is made; and
    - (ii) every person who becomes an access seeker after the standard terms determination is made; and
  - (c) specify the reasons for the standard terms determination; and
  - (d) specify the terms and conditions (if any) on which the standard terms determination is made; and
  - (e) specify the actions (if any) that a party to the standard terms determination must take or refrain from taking.
- (2) To avoid doubt, a standard terms determination may also include, without limitation, terms concerning any or all of the following matters:
  - (a) dispute resolution procedures:
  - (b) the consequences of a breach of the determination (including provision for set-off or withholding rights, or liquidated damages):
  - (c) suspension and termination of the service:
  - (d) procedures for, or restrictions on, assignment of the service.

- (3) The Commission must identify which of the terms (if any) specified in a standard terms determination are allowed to be varied, on an application made under section 30V by a party to that determination, under a residual terms determination.

A.3 Clause 2 of the UBA General Terms provides:

**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 are to be interpreted in light of the Commission's decision report and the purposes.
- 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.

**APPENDIX B: UBA STD – CO-OPERATION, REASONABLE CONDUCT AND GOOD FAITH**

- B.1 Set out below is a summary of the cooperation, reasonable conduct and good faith provisions relating to Chorus and Access Seekers in the UBA Terms.

**UBA General Terms**

- ***Overarching obligation***

- B.2 Clause 2.2.1: the Parties must carry out their obligations under the UBA Terms in good faith and in furtherance of the purposes set out in the Telecommunications Act 2001.

- ***Obligations applicable to Chorus and Access Seekers***

- B.3 Clause 7.1: subject to the UBA Terms, Chorus will supply the UBA Service, and the Access Seeker may order the UBA Service, in accordance with the processes and procedures under the UBA Operations Manual.
- B.4 Clause 8.3.1: where technical manuals, international standards and user guides are referred to in the UBA Operations Manual, Chorus and Access Seekers must refer to these manuals, standards and guides so that, among other things, uniform standards of best practice are set.
- B.5 Clause 8.4: where technical manuals, international standards and user guides are referred to in the UBA Operations Manual, Chorus and Access Seekers must comply with any technical and procedural detail contained in such manuals, standards and guides to the extent that they create an obligation to do so.
- B.6 Clause 8.6: where the UBA Operations Manual creates an obligation to comply with a technical manual, international standard or user guide, Chorus and Access Seekers must apply that manual, standard or guide under the UBA Terms in good faith.
- B.7 Clause 27.1: if one party's network affects the performance of another party's network, the affected party may require the other to meet with it, and at that meeting the parties must discuss in good faith and endeavour to agree the steps to be taken to address the issue.
- B.8 Clause 37.10: pending resolution of any Dispute, the Access Seeker and Chorus will each 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 continue to perform their other obligations under the UBA Terms.
- ***Obligations applicable to Chorus***
- B.9 Clause 14.2: Chorus' invoices must include all reasonable information to enable the Access Seeker to check the accuracy of all Charges.
- B.10 Clause 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.

- B.11 Clause 21.3.1: Chorus must 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.
  - B.12 Clause 21.5.1: Chorus must use all reasonable endeavours to give the Access Seeker as much advice as possible of the existence of any Unplanned Outage.
  - B.13 Clause 21.6: Chorus must act reasonably and in good faith in planning and implementing any Planned Outage and managing any Unplanned Outage, with a view to minimising the impact on the Access Seeker, and Customers and End-Users of the Access Seeker.
  - B.14 Clause 26.2: Chorus is responsible for the safe operation and upgrading of Chorus' Network in a manner that does not endanger the safety or health of any of the Access Seeker's employees, contractors, agents or Customers, or damage, interfere with or cause any deterioration in the operation of the Access Seeker's Network (except where damage, interference or deterioration is caused by the Access Seeker's failure to ensure compatibility).
  - B.15 Clause 28.4.2: where Chorus supplies an Access Seeker with Chorus Owned Equipment, Chorus must, where necessary to ensure the Access Seeker is able to meet its obligations in relation to that Chorus Owned Equipment, provide the Access Seeker with adequate and timely information regarding the maintenance specifications.
- ***Obligations applicable to Access Seekers***
- B.16 Clause 11.1.1: an Access Seeker must follow Chorus' reasonable directions about the use of the UBA Service which Chorus reasonably believes are in the interests of health or safety, or necessary to ensure quality of service or prevent a risk to persons and property.
  - B.17 Clause 11.1.2: an Access Seeker must use all reasonable endeavours to provide such information as Chorus reasonably requires in order to perform its obligations.
  - B.18 Clause 11.1.3: an Access Seeker must use all reasonable endeavours to ensure that information disclosed is correct and complete.
  - B.19 Clause 11.1.4: an Access Seeker must use the UBA Service for lawful purposes, in accordance with law and without being a nuisance to anyone.
  - B.20 Clause 11.1.5: an Access Seeker must not interfere with the reasonable use of any service by any customer of Chorus or of any Other Service Provider.
  - B.21 Clause 11.1.6: an Access Seeker must, 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 an

Access Seeker (other than authorisations, licences or consents required generally by Chorus to operate Chorus' Network).

- B.22 Clause 11.1.7: an Access Seeker must, 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).
- B.23 Clause 11.1.8: an Access Seeker must, except where the law requires otherwise, only use the UBA Service in ways that are contemplated by the UBA Terms.

**UBA Operations Manual**

**- *Obligations applicable to Chorus and Access Seekers***

- B.24 Clause 3.1.1: where technical manuals and user guides are referred to in this Manual, Chorus and Access Seekers must refer to these manuals and guides so that, among other things, uniform standards of best practice are set.
- B.25 Clause 3.1.2: where this Manual creates an obligation to comply with a technical manual or user guide, Chorus and Access Seekers must apply that manual or guide under the UBA Terms in good faith.
- B.26 Clause 4.1.1: the parties will deal with each other in good faith in relation to this Manual, and will act co-operatively and in good faith to facilitate the processes and procedures required for supply of the UBA Service.
- B.27 Clause 4.1.2: the parties must use all reasonable endeavours to resolve an issue arising under the Escalation Protocol, before giving a Dispute Notice under the UBA General Terms.

**- *Obligations applicable to Chorus***

- B.28 Clause 6.1.4: Chorus will use all reasonable endeavours to minimise the waiting period for completion of Orders for Handover Links.
- B.29 Clause 6.1.6: where an Access Seeker fails to submit any of the required BAU Forecasts, Chorus will use all reasonable endeavours to process any relevant Orders (but is not required to meet the Service Levels).
- B.30 Clause 7.1.1: Chorus will use all reasonable endeavours to notify an Access Seeker if Orders placed by a means other than OO&T are received.
- B.31 Clause 7.2.5: Chorus must use all reasonable endeavours to provide an Access Seeker with reasonable prior Notice of restrictions or prohibitions placed on access to OO&T.
- B.32 Clause 9.6.2: Chorus will use all reasonable endeavours to meet the notified expected Ready For Service date.

B.33 Clause 10.4.5: Chorus must use all reasonable endeavours to provide an Access Seeker with prior Notice of restrictions or prohibitions placed on access to OFM.

- ***Obligations applicable to Access Seekers***

B.34 Clause 6.1.1: an Access Seeker must use all reasonable endeavours to provide Chorus with accurate Forecasts of the volumes of its expected Orders.

**APPENDIX C: COMMENTARY ON LEGAL ADVICE TO COMMISSION  
(LAURENSEN QC / EVERY-PALMER, 3 SEPTEMBER 2014)**

- C.1 The Advice is stated to be about the “legality” of Chorus’ proposed changes to UBA services. Such “legality” depends upon identification of Chorus’ relevant legal obligations. That in turn depends on an analysis of the general regulatory framework – essentially, the Act; and of the specific obligations imposed by Decision 611 – that is, the copious UBA Terms.
- C.2 The Advice contains no such analyses. It refers only to section 18 of the Act, and to clause 2.2.1 of the General Terms. In terms of general legal authority, it refers only, and then by way of a footnote, to a published lecture from 1993 by a retired Chief Justice of the High Court of Australia.<sup>10</sup>
- C.3 Accordingly it is not possible to engage with analyses of the type contemplated in C.1, above, as none are included in the Advice.

**“Loyalty to the promise”**

- C.4 Insofar as the Advice refers (at paragraph [10]) to Sir Anthony Mason’s paper (see C.2, above), it is cited as support for the proposition that:

good faith requires ‘loyalty to the promise’ and constrains Chorus from acting in a way that weakens or undercuts the regulated UBA service for the ulterior motive of making Boost services more attractive by comparison.

This passage involves three concepts which warrant response: loyalty to the promise; undercutting; and ulterior motive.

- C.5 On “loyalty to the promise”, Mason uses that phrase as a shorthand for “an obligation on the parties to co-operate in achieving the contractual objects”.<sup>11</sup> As our analysis of the Act and UBA Terms identifies, the general objective is the supply of the (defined) “UBA Service”. The UBA Terms are required to specify the access provider’s (and the access seeker’s) obligations; and they do so in great detail, including explicit cooperation obligations: see our Appendix B.
- C.6 Conversely, what the Advice fails to identify is any of the *specified* obligations which Chorus has contravened. In this it departs from the orthodox “loyalty” involved in interpretation of a document: loyalty to *the text* read in its setting.<sup>12</sup>

**“Undercutting”, “ulterior motive”**

- C.7 On “undercutting” the regulated UBA service, Chorus’ position is that it is entitled to offer a differentiated service, as was the case for Telecom and VDSL2. That position is made clear in Chorus’ advice to the Commission of its proposed “Boost” services, but is not addressed in the Advice.

<sup>10</sup> A F Mason “Contract, Good Faith and Equitable Standards in Fair Dealing” (2000) 116 LQR 66.

<sup>11</sup> Mason, above, at pp69 and 75

<sup>12</sup> Cf *Society of Lloyd’s v Robinson* [1999] 1 WLR 756 (HL) at p763C.



- C.8 If it is legitimate to offer a service with greater benefits for retail service providers (RSPs) and, consequently, more onerous obligations on Chorus, than does the regulated service, demand for the latter will be reduced. But there is no utility in applying the pejorative language of “weakens or undercuts” to the offering of a commercial service in accordance with the provisions of the Act and UBA STD any more than in the VDSL2 context.
- C.9 Nor does the language of “weakens or undercuts” provide any logical assistance to an analysis of the service to be offered (and thus the relevance of changes to that service), as it presupposes that the services to be provided is other than defined in detail by the UBA STD.
- C.10 The same points apply to the Advice’s reference to Chorus’ “ulterior motive” in seeking to make Boost more attractive to RSPs than the regulated (and price controlled) service. As a firm with obligations to shareholders, Chorus is not engaged in any “ulterior motive” in pursuing that obligation – *unless* it is otherwise legally constrained.

**“Core principles”**

- C.11 More specifically, the Advice sees “good faith” as breached by Chorus’ proposed changes being inconsistent with the “core principles of the regulated UBA service”.
- C.12 These “core principles” are extracted from the authors’ review of the Commission’s Decisions 568 (of December 2005, on TelstraClear’s section 20 application), 582 (of June 2006, on section 20 applications by Ihug and CallPlus) and 611 itself.
- C.13 However, this search for “core principles” *outside* the UBA Terms themselves is misplaced. As explained in our memorandum, the terms of supply specify the regulatory constraints on Chorus’ common law freedom to trade on its own terms. They are meant to be specified in “standalone” terms in the UBA Terms – and they are. Neither Chorus nor any RSP should be expected to go beyond the UBA Terms themselves to ascertain their entitlements and obligations in relation to the defined designated access service.
- C.14 In other words, the Advice errs in pursuing a redefinition of the “UBA Service” and of the specified supply obligations on Chorus outside (and essentially without reference to) the promulgated “UBA Terms”. Nor is such a pursuit justified by the clause 2.2.1 reference to “good faith”. As explained in our memorandum, that reference foreshadows the explicit cooperation obligations to follow (see Appendix B) and cannot found any *implied* obligation not found in the UBA Terms.
- C.15 These objections extend to the new obligations which the Advice deduces from the “core principles”. In particular, the essential complaint articulated in the Advice is that Chorus’ proposals would prevent the evolution and improvement of the UBA Service: paragraphs 10(c)(i) and (iii), (d) and (e).
- C.16 In other words, the Advice proposes that:

- (a) Chorus' obligation is to provide the UBA Service at the maximum performance levels practicable at all times and using the highest performing technology it operates; and
- (b) conversely, Chorus is prohibited from ever offering a contractual UBA variant, however differentiated it may be.

(No corresponding obligation on any access seeker is suggested in the Advice.)

C.17 Those would constitute an extraordinary obligation (and prohibition) and none is provided in the UBA Terms. To the contrary, as emphasised earlier, no such obligation (or prohibition) can be imported into this detailed regulatory context through a reference to "good faith", given the specific provision for:

C17.1 technological neutrality (cls 1.3 and 2.2);

C17.2 specified throughput requirements (cls 3.12 and 4.10); and

C17.3 differentiated commercial variants (cls 10.1 – 10.3).

**Content of "Core Principles"**

- C.18 While, for the reasons traversed above in this Appendix and in the memorandum, we consider that the Advice errs fundamentally in proposing that a set of "core principles" extracted from materials outside the STD can be imposed through the general reference to "good faith" in clause 2.2.1 of the General Terms, the Advice's identification of those "core principles" is also unconvincing.
- C.19 As noted above, at C.11, the primary source of the "core principles" is from the authors' review of Decision 611 and, to a greater extent, from what are described as "its predecessors", Decisions 568 and 582.
- C.20 Of the seven illustrations of the "core principles" in the Commission's prior decisions referred to in paragraph 9 of the Advice, five relate to the "predecessor" determinations and two to Decision 611 itself. It is unclear, and the Advice does not explain, how Decisions 568 and 582, decisions relating to different services under separate provisions of the Act, and which (in contrast to Decision 611) are not referred to in clause 2.1 of the General Terms even as an interpretive aid, are relevant to the determination of the "core principles" of the UBA STD.
- C.21 However, more importantly, each of the illustrations referred to by the authors concern the Commission's rejection, in respect of the various services concerned, of constraints on maximum *line speed* of the regulated service. That rejection is translated into an express term in the Schedule 1 service description in clause 3.6 (further negating any requirement for an implied term). And, as explained in paragraphs 26 and 27 of our memorandum, the definition of the *line speed* of a service is a conceptually different issue from the definition of the *throughput* of the service, which is addressed separately in the UBA STD. The conflation of the two concepts in paragraph 9 of the Advice under the general concept of "dimensioning" ignores:

C21.1 orthodox telecommunications definitions of these terms;

C21.2 the separate discussion of these concepts in Decision 611, and in the consultation on the Decision. While line speed was discussed in terms of the a potential differentiation between "Full Speed/Full Speed" and "Full Speed/128 kbps" services, throughput was defined in terms of minimum specification and "best efforts" grade services. For example Telecom submitted that:<sup>13</sup>

the most appropriate way to describe the throughput specification is as a minimum commitment. By its very nature, best efforts internet means that the throughput will vary from time to time. Any specification other than a minimum commitment stops being best efforts;

C21.3 the separate definition of the line speed and throughput specifications of the service in the UBA STD.

C.22 Aside from these references to Commission decisions, the other matter referenced in the discussion of the "core principles" is the actual evolution of the service delivered by Telecom (and then Chorus) in fulfilment of its regulatory obligations as technology and end-user demand has changed over time: see n 5 and paragraph 10(e) of the Advice.

C.23 The broader context in which the comment was made in Decision 582 regarding the risk of the service becoming obsolete is telling. In particular, immediately prior to the extract from Decision 582 paraphrased in the Advice at paragraph 9(d), the Commission noted that:

[122] ...The use of a retail minus pricing principle to determine the regulated bitstream access price is considered adequate to address any concerns about the investment incentives for Telecom in respect of ADSL2+ or any other investment relating to the regulated bistream access service.

C.24 It is clear that the Commission had confidence that Telecom retained an incentive to invest (via the retail minus construct) and, accordingly, no obligation to invest was specified. Indeed, subsequent investment made by Telecom bore that out.

C.25 It follows that subsequent amendments to the Act such that RUBA is priced at "cost" (rather than retail minus) undermine those incentives to the extent that they have translated to a reduction in revenue for Chorus in providing the services. That is certainly consistent with Chorus apparently seeking to manage the level to which it is prepared to invest through the proposed changes to RUBA. Chorus' conduct in implementing any such changes is precisely the kind of thing which can be given due consideration in the context of a review undertaken pursuant to section 30R of the Act – which includes a range of procedural safeguards to protect the interests of interested parties. Stretching the interpretation of the existing UBA STD to impose additional substantive obligations (as is suggested in the Advice) operates to

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<sup>13</sup> Telecom UBA Standard Terms Proposal (11 July 2007), para 99.

circumvent those safeguards and in doing so is contrary to the design of the regulatory regime.

**- Resort to "understandings"**

- C.26 The Advice proceeds on an "understanding" that the price Chorus is paid is a price that "will reflect ongoing investment in the network" (paragraph 10(e)(iii)). It is difficult to comment on that understanding when the basis for it has not been disclosed. Our own experience is that these matters are technically complex and there are invariably a range of views as to the philosophy underpinning particular benchmarks on which pricing is based. In any event, this logic works backwards. It implies a substantive obligation from a particular view of the chosen pricing methodology. The Act works in the other direction. The Commission's role is to price the service that the access provider is obliged to provide under the UBA STD – not the other way round.
- C.27 How the actual performance of regulated UBA services over time is relevant to the identification of "core principles" in the UBA STD is not explained in the Advice, and is not at all self-evident. However, even if the subsequent performance of the regulated UBA service were relevant (which we doubt), it would have to be considered in the context of the objective evidence of the Commission's and parties' understanding of the requirements of the UBA STD.
- C.28 In that context, it would be necessary to consider (as the Advice does not) the essentially uniform statements of the Commission, the access provider, and access seekers that the actual performance of UBA services by Telecom and now Chorus has exceeded the standard mandated by regulation.
- C.29 Relevantly, in its previous decision, dated 16 April 2010, on the application of the UBA STD to VDSL technology, the Commission did not mandate a particular choice of technology, but said (at [41]):

The intent of the STD is clear. Telecom must provide access to BUBA and EUBA in accordance with the terms of the STD. *The DSL technology which Telecom elects to use to deliver BUBA and EUBA is a decision for Telecom alone. There is no compulsion on Telecom to use VDSL to deliver the regulated BUBA and EUBA services, except where they have chosen to make it the only DSL technology available in an exchange or cabinet to deliver the regulated service.*

- C.30 In addition, on the understanding of others:

C30.1 there have been a range of clear statements by industry participants that VDSL was not part of the UBA STD;<sup>14</sup>

C30.2 the Commission in its Final Determination to amend the price payable for the regulated service Chorus' unbundled bitstream access made under s 30R of the Telecommunications Act 2001, dated 5 November 2013, stated that (at [152]):

<sup>14</sup> See the UBA Price Review Conference transcript, 12-13 June 2013 and in particular: Chris Abbott pp 99-100; Graham Walmsley pp100-101 and 141.

We have expressly determined that VDSL is not a part of the regulated service where it is used to provide a higher class of service.

C30.3 there have been a statements by industry participants that the UBA STD requires only provision of the minimum specified throughput;<sup>15</sup>

C30.4 Chorus has consistently stated that throughput dimensioning, although not initially imposed on RUBA services provided over Ethernet, would be introduced in the future when customers were to be migrated.

C.31 Accordingly, even if it were relevant to attempt to distil “core principles” from materials outside the UBA STD (which it is not), the formulation of the principles contained in the Advice is not well founded. At best, it is plainly contestable. That of course, is entirely consistent with our primary and fundamental objection: that it is erroneous as a matter of legal analysis to substitute the express terms of the UBA STD for implied “core principles” which are themselves contestable and irreconcilable with the detailed and specific provisions of the STD.

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<sup>15</sup> See the UBA Price Review Conference transcript, 12-13 June 2013: Michael Wigley p101 and 129; Graham Walmsley p131.