

Cross submission as to Commission's legal advice on proposed changes to regulated services

2 October 2014

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1. Introduction

Dialogue Boost update

- 1.1 For the second time in this investigation, Chorus has announced major proposed changes days before submissions are due, again with a changed course and confusing detail. While some things are to be welcomed – such as putting Boost HD on ice – there are signs that Chorus may not be being fulsome with the Commission, and that it is achieving the same sort of outcomes by a different, yet problematic, path (presumably because the first path is not working for them).
- 1.2 The Chorus October update states:

Chorus has never proposed to “degrade” or reduce the broadband experience from today’s levels
- 1.3 That is not correct, as Chorus said it would de-prioritise regulated UBA behind Boost (which has a major impact on regulated broadband experience).
- 1.4 This major misstatement on a core issue throws into question all other aspects of the dialogue update and that calls for careful review by the Commission and stakeholders.
- 1.5 Issues arising out of the dialogue update include:
 - (a) The original issues are still live, with Chorus deferring action.
 - (b) While not clear, it seems that regulated UBA (including regulated VDSL) will be de-prioritised behind Boost VDSL. Unless Chorus confirms that is not so, Boost VDSL will breach the STD and cannot be launched. The effect is to force regulated VDSL customers off that service onto Boost VDSL, as the regulated service deteriorates increasingly due to high volumes over Boost VDSL. That does not give RSPs a real choice.
 - (c) The effect of the connection and wiring charge jumping from \$5 to \$10 is to charge double for the same service as is currently being charged. To put this in context, Chorus would recover, monthly, nearly double the base \$10.92 charge. Doubling charges from \$5 to \$10 overnight is a strong signal of market power requiring regulation (that can be done by a brief 30R).
 - (d) The proposals do not solve getting VDSL properly within the STD and key terms are excluded.
 - (e) There is detail around handover point, additional charges, etc, to be reviewed (that has not been possible in a short period). The starting assumption is, even if not in breach, the Chorus approach will reflect market power requiring regulation.

Overview of the Chorus approach in its submissions

- 1.6 Chorus has made detailed changes of tack (for example, having line speed issues limited only to copper is new).

- 1.7 We agree with much that Chorus and its lawyers have to say, for example as to the primary role of the service description and the need to frame good faith obligations within that structure.
- 1.8 Dr Patterson in particular, in giving his opinion to his successors on how to interpret his 2007 and 2010 decisions, fails to correctly apply standard interpretation principles including as to context. If interpretation was done correctly by Chorus, Chapman Tripp and Dr Patterson, the conclusions they reach are not available.
- 1.9 In this regard, context, and the background and facts ubiquitously known by telecommunications people and regulators, make it clear that their submissions are unsustainable. Context is a key component in any interpretation exercise where there are different possible interpretations.
- 1.10 Dr Patterson concludes that the UBA STD commits to a maximum throughput obligation 32 kbps over 15 mins. So do the others. We need to be clear that, in interpreting the STD, that is the issue, and not some higher speed Chorus voluntarily applies. The latter cannot disguise the true legal position: Can Chorus actually limit throughput to 32 kbps over 15 minutes? If not, there must be some other interpretation of the STD.
- 1.11 Dr Patterson is saying, when giving advice to his successors, that his 2007 decision has the following effect:
 - (a) Chorus complies with the STD if it provides around dial up speeds (given line speed for dial up in 56 kbps), even though DSL is a multi-Mb broadband service.
 - (b) The STD is not to be interpreted to give effect to his decision underpinning the FS/FS approach:

The Commission was of the view that a single internet-grade FS/FS Basic UBA service would best give effect to s 18, and that **continuing to limit the upstream line speed of the Basic UBA service to 128 kbps** would be unlikely to meet the changing needs of residential and SME broadband end-users where there is increasing use of symmetric web based applications such as social networking websites, **video content**, and increasing file sizes in general for residential and SME end-users.
- 1.12 If 128 kbps line speed won't work for what Dr Patterson intended in 2007 (which produces throughput higher than 32 kbps), 32 kbps throughput won't work. Dr Patterson is saying with strength that the service in the STD does not meet one of his key reasons at the time.
- 1.13 There is no prospect, had Dr Patterson been asked the question at the time of preparing the STD, that he would have said that the maximum throughput would be a fraction of normal DSL throughput.
- 1.14 Having moved from regulator, with a primary focus on s 18 consumer welfare, to the regulated monopoly, Dr Patterson feels able to take a different line for the regulated monopoly, diametrically opposed to what he said then.

- 1.15 We outline below the rudimentary reasons why the FS/FS requirement is end to end and not limited to copper and DSLAM, which also means that there cannot be throttling at the handover point as that is contrary to the FS/FS requirement.
- 1.16 We also outline why throughput is not a maximum obligation but rather, in the words of Chorus (as part of Telecom) a minimum obligation. The Commission's legal advice correctly describes the throughput obligation as a "universal rock bottom" for the service. Throughput based on maximum line speed but given this is internet grade and multiple factors affect throughput, there is a committed minimum of 32 kbps. And that is exactly the sort of conclusion that those in telecommunications including regulators would draw in the real world.
- 1.17 The issue under consideration is incorrectly clouded by Chorus by reference to investment issues. That may arise at some point. The immediate issue is only around the network as installed: the switches, fibre, DSLAMs with or without VDSL cards) etc. Over that in situ FS/FS service, the line speed must be maximum end to end, and throughput cannot be actively degrade by de-prioritisation and by throttling at the handover point.

VDSL

- 1.18 Dr Patterson does the heavy lifting on VDSL. He says that including VDSL in the 2007 STD is not tenable. But the reason he gives for interpreting his 2010 decisions for the benefit of his successors is incorrect. In particular, he does not address the multiple other reasons given as to why his decisions then were wrong.
- 1.19 It is unusual for a monopoly to use the regulator who made a strongly criticised decision in 2010, to justify his decision and its interpretation to his successors.

This submission

- 1.20 As Chorus has changed tack to a large degree, in its lengthy submissions and lawyers' opinions, and in the Dialogue document, this cross submission, while often canvassing points already made by us, is longer as a result.

2. Where we agree with Chorus, Chapman Tripp and Dr Patterson

- 2.1 We agree with much that is said in the Chorus, Chapman Trip and Patterson submissions, while fundamentally disagreeing with other aspects.
- 2.2 We agree that that the focus should be on the substantive terms especially the service description. Chapman neatly- and correctly – refer to good faith obligations as **supportive** rather than **originating**.¹ Chorus usefully frame this as follows: "*It is a basic principle in law that general obligations cannot override the specific.*"² The starting point must be the substantive terms.
- 2.3 We also agree that the STD states the terms on which Chorus must deliver the service (we consider there is room for implied terms too, but it is not necessary to deal with that in this submission). A key point is how those terms are to be interpreted and context is important in this.
- 2.4 Both Chapman Tripp and Dr Patterson use some of the interpretation principles that are to be used when interpreting documents such as STDs. But they do not sufficiently clearly articulate the required approach and are incorrect in parts.

¹ Chapman Tripp 19 September 2014 Opinion at [44]

² Chorus 18 September 2014 Submission at [4]

We focus on the structure of the required approach at the start of this submission, including the approach to interpretation.

- 2.5 As with our last submission, we focus – as does Chorus – on the substantive issues, rather than the complaint. We touch briefly on good faith at the end of this submission.

3. Being clear about what the Commission is doing

- 3.1 Summarising what we said in our last submission, it is not for the Commission to decide if there has been a breach: that is for the Court. The Commission's role is as follows (going beyond this raises public law issues such as pre-determination):

(a) To decide what to do about Spark's complaint. Primarily this is a question of whether there are grounds to take this to court, which is a decision quite similar to the Commission's normal decisions as to the merits of litigating. There will be secondary issues around whether to litigate from a policy and outcomes perspective but the first question is squarely as to the merits of litigating. Because of a point that Chapman Tripp makes – dealt with below – this also raises considerations as to what evidence is going to be available.

(b) To decide whether to do a clarification or a s 30R review. For that purpose it is necessary to assess the legal effect of the STD as it stands. A 30R decision can only be made post-November 2014 but there is nothing stopping the Commission, prior to December 2014 from issuing a draft decision as to whether or not it will do a s 30R review. That would be helpful so long as the final decision (if it is to commence a review) is not made until December.

- 3.2 There is some value in the Commission giving indications to stakeholders, in the hope of resolving matters sooner, but the Commission must do that within the confines above, and recognising too that it is not the final arbiter. Other parties can also litigate. A clean bill of health from the Commission does not stop others litigating, which does make the current debate unusual and ultimately not decisive.

4. Clarity as to application and interpretation of the STD is critical.

- 4.1 Largely for the reasons given by Chorus, Chapman Tripp and Dr Patterson, we agree that it is the words of the STD including the decision that determine what Chorus is required and permitted to do.³

- 4.2 Standard interpretation principles apply, and, subject to the addition of reliance on context, and on the Act, we agree with Chapman Tripp when they say:⁴

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. This requires an objective approach to interpretation, having particular regard to the structure of the instrument and the operative language employed.

³ There may be implied terms as well but we don't need to address that here.

⁴ Chapman Tripp 18 September 2014 opinion at [18] (footnote omitted)

- 4.3 In fact there is no need to refer to general principles because the STD states the position, at cl 2.1 of the General UBA terms:

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.

Legislative context

- 4.4 Chapman Tripp's extensive reference to the relevant provisions of the Act confirms the uncontroversial proposition that interpretation of the STD can also take account of the Act's relevant provisions. Inclusion of s 18 in this way is made express in the clause last quoted.

Context

- 4.5 The STD fits within a regulatory and technical context, well known to those that must comply with the STD, and those that rely on compliance. It is incontrovertibly so that the courts will, where necessary, have regard to context in interpreting instruments such as this.
- 4.6 As Burrows and Carter observe in *Statute Law in New Zealand* (4th edition):⁵

"Thus, courts can rightly expect to be informed of such social, economic and other contextual factors as may affect interpretation. An interpretation illuminated by such contextual material, which places the statutory provision in its setting, can give a different, and often more satisfactory result than one based solely on grammatical and literal considerations. The Court is better able to assess the impact of its decision on the relevant communities of interest."

- 4.7 Chapman Tripp say at [C.13] that Chorus and RSPs should not be expected to go beyond the UBA terms themselves to ascertain their entitlements and obligations. We doubt however they would contend that the STD is to be interpreted independently of context where there is ambiguity etc. That would make the STD exceptional amongst instruments, whether statute, contract, etc. In any event, cl 2 of the General Terms direct interpretation issues to contextual aspects.

Dr Patterson's use of the "documentary record"

- 4.8 In justifying his advice to the Commission on how to interpret his 2007 and 2010 decisions, Dr Patterson relies on a type of context: what he calls the "documentary record". This is primarily the documentary chain leading up to the STD.
- 4.9 First, the error in his approach is demonstrated by his using in his list of documents in the "documentary record" documents that were produced after the 2007 (and 2010) decision was made.⁶ For example, he says that, when interpreting his 2007 decision, a letter from RSPs of 10 July 2013 to the

⁵ Page 256; footnote omitted.

⁶ Dr Patterson's 18 September 2014 opinion at [1.79iv]

Commission is relevant. That cannot be so as it is after the event. We return to that and other post 2013 events below.

- 4.10 Some of the so-called “documentary record” **might** be relevant to interpreting the STD terms, despite Dr Patterson saying in his 2007 decision at cl 2.1 General Terms, contrary to what he now says, that it is the determination itself and s 18 which are relevant, implicitly cutting out the relevance of prior materials.
- 4.11 But the “documentary record” is only relevant if and to the extent that reliance on the prior material is necessary in interpreting the STD terms. That falls back to carefully framing what the court would be doing, within sound interpretation principles. That is something that Dr Patterson does not do, contrary to basic interpretation principles. (There may also be issues as to what pre-STD Commission material is admissible, just as there are in relation to interpretation of statutes (for example as to the status of Minister’s statements outside Parliament): that is a further issue that might need to be considered by a court).

“Core principles”

- 4.12 The Commission’s legal advice refers to “core principles”. These can be helpful in interpreting the instrument but are better crafted as applicable matters in a standard interpretation exercise rather than as “core principles”.

Conclusion as to interpretation

- 4.13 The court’s role is to interpret the STD obligations, applying standard interpretation principles, in context and having regard to purpose, as further clarified in cl 2.1 of the STD General Terms. Of course, recourse to other materials and context is not required where the relevant words are clear enough.
- 4.14 None of that is controversial: it is how lawyers interpret instruments day in and day out.
- 4.15 In turn, the Commission’s role is to assess the merits of litigating and that in turn requires an assessment as to how the court would approach these issues, with the benefit of contextual material and evidence (including expert evidence).

5. A new line for Chorus: FS/FS applies only from DSLAM to end user

- 5.1 For the first time, Chorus, including via Chapman Tripp and Dr Patterson, say that the FS/FS obligation is limited only to the line between the DSLAM and the end user. In this way, it is now argued that the throughput metric is standalone and not affected by the line speed metric.
- 5.2 Chorus, Chapman Tripp and Dr Patterson all start by making the same error: by concluding that the STD line speed requirement applies only to the path between the DSLAM and the end user (ie the copper path). For example Chapman Tripp say:⁷

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

⁷ In the Chapman Tripp 18 September 2014 opinion (footnote omitted)

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.

5.3 But cl 3.6 does not say that it applies only between the end user and the DSLAM. Clause 3.6 is expressly to the contrary: that the line speed requirement applies end to end. Cl 3.6 applies to the full "Basic UBA Service" and that is the service from the end user to the data switch on the RSP's side:

(a) Cl 1.1 of the Service Description states

"Basic UBA Service means the UBA service as described in section 3 of this schedule."

(b) Section 3, read in the context of Section 2, makes clear that the "Basic UBA Service" is the end to end service.

(c) The error by Chorus and Chapman Tripp appears to flow from incorrectly conflating cl 3.6 above with cl, 3.7, which states:

3.7 The maximum upstream or downstream line speed that the DSLAM can support on the End User's line given existing line conditions is subject to [certain conditions]

(d) Cl 3.7 expressly refers to the DSLAM. Clause 3.6 expressly refers to the end to end service with no reference to the DSLAM. It does not say "the service from end user to DSLAM": it states the full end to end service.

(e) As a matter of straightforward interpretation, cl 3.6 speaks clearly for itself: FS/FS end to end. The contrasting footprint in cl 3.7 (limited only to the copper wire) emphasises this point instead of supporting a more limited footprint under cl 3.6.

5.4 Dr Patterson's error, in giving his opinion to his successors on the meaning of his 2007 decision, is that he completely fails to deal with cl .3.6 (the line speed end to end provision). He does not refer to it when drawing his conclusion at three points in his opinion. He comes to his conclusion based only on cl 3.7 (the DSLAM provision) on the basis that this is the only operative requirement. See [1.7(c) (ii)], [4.5] and [6.6] of his opinion.

5.5 Although not necessary, we will also deal below with context and the relationship between the throughput and line speed metrics.

5.6 We note at this point that:

(a) telecommunications "lines" are not limited in this STD to dedicated lines (such as copper). They can include shared paths or lines such as fibre. In any event, it is clear here that a "line" includes shared paths such as fibre. The footprint for the "line" is clearly end to end and so shared lines are "lines" in this STD.

- (b) Chorus, Chapman Tripp and Dr Patterson, all assume that a DSLAM has a function only as to the end user-facing copper path. But as the Sch 1 definition states, the DSLAM is a data switch: it transmits traffic to and from end-users and handover points. Limiting speeds to less than FS/FS affects traffic on both sides of the DSLAM. Thus cl 3.7 is not an argument for limiting FS/FS to only the copper line. But in any event, cl 3.6 makes this point irrelevant.
- (c) A separate focus on the DSLAM in cl 3.7 is understandable. A service is only as fast as its slowest link and it is the copper speed that dictates the maximum line speed. In practice, the copper speeds drive the overall performance.

6. Throughput metric

- 6.1 We agree that the throughput and the line speed metrics are separate, but they are also inextricably linked.

The throughput requirement

- 6.2 The throughput metric is preceded by: “The table below outlines the metrics that the Basic UBA Service will achieve”. The throughput metric is

Throughput 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

- 6.3 The 32 kbps is a per End User metric and not the metric proposed to be used by Chorus which was to be 300 kbps times number of end users. Given the aggregation of users in this way, this effectively is generally more than simply 10 times the STD 32 kbps requirement.

The reality

- 6.4 Limiting the service to the 32 kbps per user throughput over 15 mins – as Chorus, Chapman Tripp and Dr Patterson say must be legally possible under their interpretations, would produce a service similar to dial up speeds, for what is a multi-MB/s broadband service. It is no wonder that Chorus would not cap speeds to the levels they propose (32 kbps per end user over 15 mins). That would produce, from technical, commercial and regulatory perspectives, completely unrealistic UBA performance. The Emperor’s Jockeys would quickly be revealed.
- 6.5 To succeed in their argument, it must be accepted by Chorus that Chorus has the legal right to enforce performance in the order of dial up. That they choose to supply faster services does not disguise this basic fact.
- 6.6 Dr Patterson effectively and unequivocally advises his successors that the UBA STD in his name as Telecommunications Commissioner limits the maximum throughput obligation to 32 kbps per end user measured over 15 mins.
- 6.7 There is no prospect, had Dr Patterson been asked the question at the time of preparing the STD, that he would have said that the maximum throughput would be a fraction of normal DSL throughput, around dial up instead of broadband

speeds. A broadband service with the speed of dial up?⁸ That is unthinkable. But it is the effect of what is being said.

- 6.8 It is also of concern for Chorus to be taking this unrealistic position.
- 6.9 It is not necessary to refer to documents to show that Dr Patterson would never have intended Chorus to be able to supply the service so as to deliver performance in the order of dial up –as that is a straightforward conclusion. But the determination at the time makes this clear. Performance not exceeding 32 kbps per user over a 15 minute period falls a great deal short of what he stated in his determination on the STD to justify the FS/FS decision (highlighting added):⁹

The Commission was of the view that a single internet-grade FS/FS Basic UBA service would best give effect to s 18, and that **continuing to limit the upstream line speed of the Basic UBA service to 128 kbps** would be unlikely to meet the changing needs of residential and SME broadband end-users where there is increasing use of symmetric web based applications such as social networking websites, **video content**, and increasing file sizes in general for residential and SME end-users.

- 6.10 32 kbps throughput does not work for video content. 128 kbps line speed does not work for video content, and, as expert witnesses will uncontroversially tell the court, 128 kbps line speeds produce throughput substantially greater than 32 kbps.
- 6.11 It is unsatisfactory that:
- (a) Chorus would have the Commissioner at the time purporting to give legal advice to his successors on his interpretation of his decision, justifying ex post facto what happened then (wrongly as it happens in multiple ways);
 - (b) Chorus has asked the gamekeeper, statutorily committed to upholding the long term interests of end-users, who would never have made the contended decision, to make these poacher-like submissions for the monopoly that he regulated (previously Chorus as part of Telecom, and now Chorus as a standalone).
- 6.12 This approach by Chorus adds to the existing list of the concerns others have identified around its absence of good faith.
- 6.13 As we outline above, context when interpreting an instrument is material. Given the position contended by Chorus and its advisers is not tenable, the courts will look to a different interpretation.

7. What are “throughput” and line speed?

⁸ Dial up has maximum speeds of 56 kbps with practical performance below that, but the 32 kbps metric is in the dial up league compared to

⁹ Decision 611 at [59]

- 7.1 We'll use the definitions from Newton's Telecommunications Directory (26th ed) relied on by Chorus and their advisers, which also reflect what expert witnesses would tell the court:¹⁰

Throughput is "The actual amount of useful and non-redundant information which is transmitted or processed. Throughput is the end result of a data call. It may only be a small part of what was pumped in at the other end. The relationship of what went in one end and what came out the other is a measure of the efficiency of that communications network. Throughput is a function of bandwidth, error performance, congestion, and other factors."

Line speed is "The maximum number of bits you can transmit over a line in a certain defined time, say one second."

- 7.2 Despite relying on those definitions, Chorus sees line speed as a snapshot at one point of time, whereas throughput is what is transmitted over a period of time. But the definitions they rely on show that both metrics are about what is transmitted over time. Line speed is the maximum number of bits that can be transmitted over a period of time. Throughput is the actual amount of useful information transmitted over a period of time. As is well known by stakeholders, and as evidence to the court would confirm, actual throughput rarely achieves the maximum line speed.

8. The key point on line speed

- 8.1 Line speed is about maximum achievable speeds as configured for the network.
- 8.2 For the reasons above, the maximum line speed is what the network can achieve over the full UBA footprint. By throttling the traffic to 32 kbps (on average over 15 mins), or to 300 kbps times number of users, reduces the service below maximum speeds, and that breaches the STD.
- 8.3 Thus, throttling is a line speed issue.
- 8.4 This is also further reason why there cannot be de-prioritisation; by a means different from throttling, de-prioritisation means the regulated service is not maximum line speed. Components were there is de-prioritisation of regulated UBA behind Boost are not at maximum line speed.

9. The key point on throughput

- 9.1 Maximum line speeds are not generally achieved in practice. That is as a result of the variables over a service. It is what is achieved in practice that is "throughput". That flows from variables, including, as Newton's dictionary in the passage above identifies, "*bandwidth, error performance, congestion, and other factors.*" The variables reduce actual performance below line speed.
- 9.2 That is very well known to all, including Chorus, RSPs, telecommunications consumer groups and telecommunications regulators. That is, this is the context known to all readers of the STD and the context in which the court interprets the STD. It is easily established by evidence to the court (for example, it is well known that congestion at a switch can slow traffic down, when at other times the traffic flows unimpeded: that is the nature of internet grade services). That known background is used when interpreting an instrument: as

¹⁰ See for example [19] and [23] in the Chorus 18 September 2014 submission

Burrows and Carter say in Statute Law in New Zealand,¹¹ *“This need occasion no surprise, for any reading of any text draws on material outside the words on the page, on knowledge of the language, the society and the particular subject matter.”*

- 9.3 Also established easily by evidence is that “throughout” has, as a key causal ingredient, the maximum line speed possible over the service. As night follows day, reduce the maximum line speed available over the service, and throughput correspondingly reduces. These are not standalone metrics.
- 9.4 Further, the definition of throughput relied on by Chorus and its lawyers states that throughput is “ a measure of the efficiency of the network”. That and the list of variables impacting throughput indicates that throughput is primarily a factor of performance within the network’s capability. For the reasons in the next section of this submission, we are not yet concerned with the need to invest for future capacity. We are concerned with the in situ network and throughput over that network
- 9.5 Chorus proposes something entirely different from throughput based on the capacity of the network, which is how the definition defines throughput. Adopting the very useful description by Spark, there is **active degradation** of the network, by artificially throttling regulated traffic at the handover point. That is contrary to the definition relied on by Chorus.
- 9.6 But, most clearly, Chorus being able to limit the service to the 32 kbps over 15 minutes¹² makes the service untenable, and contrary to, for example, the symmetric video capability the determination calls for. Context, including the determination, makes clear that the court will not interpret the STD to permit the 32 kbps to be a maximum.
- 9.7 There is no prospect that the court would interpret the STD to allow Chorus to cap the service at 32 kbps over 15 mins when that so clearly defeats the intend of the STD, as stated in the determination. That this is being argued raises the sort of good faith issues referred to by Spark.
- 9.8 A court can and will easily interpret the STD to avoid such a perverse outcome. As we have outlined in earlier submissions, the throughput commitment can easily be treated as a minimum obligation, designed to cater for all UBA services such as (a) Conklin DSLAMs in remote locations and (b) when the network is overloaded, such as when a new Game of Thrones episode is released in the US.
- 9.9 In fact that appears to be the very thing that Chorus (as part of Telecom) envisioned in its submission quoted at [C21.2] of Chapman Tripp’s opinion, with its reference to “minimum commitment” and not “maximum commitment” to accommodate the fact that “best efforts internet means that the throughput may vary from time to time.”

¹¹ Page 247 4th ed.

¹² Chapman Tripp say that the 15 minute time frame for the metric allows for time when the end-user is not downloading data (for example, when she is reading the downloaded material).

Chorus knows that this is not the way such metrics work, and expert evidence of what the industry well knows will show that to be otherwise. It is surprising that Chorus has allowed that opinion to be given. It is one thing to have the metric met by traffic bursting beyond the 32 kbps (and flowing at less than 32 kbps at other times). That is different from having a metric that accommodates user downtime.

- 9.10 In effect, the service is to be up to maximum line speed end to end, but throughput, which is related to but below maximum line speed, can degrade due to usage, etc, from time to time, down to 32 kbps. This conclusion is well set out in the Commission’s legal advice as a “universal rock bottom”. In context, this is not at all controversial.
- 9.11 Chorus submits, at [29] of its submission, that, absent the 32 kbps being a maximum, it cannot be established what the engineering and design choices must be. That is not correct. The Court can readily determine what is required of Chorus (and indeed based on industry practice, Chorus can determine that too, readily). The courts often makes such decisions. As noted in the next paragraph, there is potentially a separate question about the need for investment. The question here though is about what the in situ network must do. This is an internet grade service meaning that it has lower assurances around service than, say, carrier grade. Additionally, traffic throughput varies due to multiple factors including those outside the control of Chorus (eg performance drops when the GoT episode is released). But that does not at all mean that the required performance standard is not enforceable. Expert evidence would produce hardly any variation on what standard the service must perform to.
- 9.12 Finally on throughput, Dr Patterson makes another error when interpreting his decision for his successors. He says at that “While line speed is controlled at the DSLAM, throughput is dimensioned at the first data switch handover point”. (See [1.7(c)(v) and [6.9] of his opinion). Based on the definitions relied on by Chorus (but, more to the point, what all telecommunications stakeholders including regulators well know), throughput is a result of a number of variables, one of which is the dimensioning of the network components: further throttling at the handover point is active degradation and that is different from normal elements contributing to throughput. Even if active degradation at the handover point was permitted, throughput is an end to end network and usage issue.

10. Investment in the network

- 10.1 Chorus and its legal advisers note that the Commission’s advisers’ interpretation is such that, contrary to the express words of the network, Chorus must invest under the terms of the STD.
- 10.2 It is not necessary to deal with the investment issue at this point. The fact is that Chorus currently has the network it uses, and the immediate issue is not about the need to further invest. It is about use of the in situ network to provide the UBA service. Viewed this way, the position is clear. Even without active degrading, the in situ network will have elements which reduce throughput.

11. Room to introduce new services

- 11.1 Our interpretation above leaves room for commercial variants as to which the Commission may or may not do a 30R review. For example, as with the proposed Boost VDSL service, the handover point differs from the regulated handover point (that is, the footprint is different). The suggestion that this interpretation leaves no room for commercial variants, which are envisioned by the STD, is not correct.

12. VDSL

- 12.1 Chorus and its legal advisers continue to submit that VDSL is not a regulated service which must be supplied wherever VDSL capability is installed in a DSLAM.

- 12.2 In our August submission and cross submission, and in our last submission, we set out a number of reasons why:
- (a) VDSL is a regulated service that must be supplied wherever a VDSL card is installed in a DSLAM (and that has been the case since 2007).
 - (b) The fact that Chorus can choose not to put VDSL cards in DSLAMs is irrelevant as Chorus must supply VDSL wherever the DSLAM in fact has a VDSL card. Chorus is not forced to put VDSL cards in.
 - (c) The Commission's 2010 decisions were incorrect; and
 - (d) It is the court that decides the issue not the Commission and the 2010 decisions are not relevant in that context.

Chapman Tripp's opinion

- 12.3 Their opinion does not particularly focus on VDSL with that primarily left to Dr Patterson. But their observations on technology neutrality and on comments at the IPP conference are relevant.
- 12.4 Chapman Tripp incorrectly say at [33] that the STD is technologically neutral:
- (a) DSL is a technology specific service, and all stakeholders know this. DSL can only be a DSLAM-supported service across high frequency copper over the last mile;
 - (b) If a VDSL card is installed in the DSLAM, then VDSL must be made available as that is "The maximum upstream or downstream line speed that the DSLAM can support" (cl 3.7 service description). It is that which Chorus must provide. On lines suitable for VDSL where VDSL is installed, a VDSL service has the maximum "line speed that the DSLAM can support".
 - (c) Cl 3.28 of the service description also makes clear that VDSL is part of the regulated service where it is installed:

The Basic UBA Service is available where Chorus has ADSL or ADSL2+ (or other next generation type technologies) coverage
 - (d) As noted above, Chorus can choose whether to install VDSL capable DSLAMs but that is not the issue here, as Chorus has installed such DSLAMs. It is the in situ position that counts at this stage.
- 12.5 Chapman Tripp refer also to what are said to be clear statements in 2013 by industry participants that VDSL was not part of the STD.¹³ However:
- (a) That is irrelevant in interpreting the 2007 instrument;
 - (b) In any event, the comments from the IPP conference were simple acceptance at that point that the 2010 VDSL decisions were binding and the end of the matter: subsequently that is shown not to be so as (i) it is not the Commission that decides and (ii) the 2010 decisions are incorrect. The RSPs had opposed VDSL being excluded from the STD anyway.

¹³ [C30]

- (c) Only some of the many RSPs made these comments. Others are not bound. Further, they do not bind the consumer interests.
- (d) There are no waivers of rights but, in any event the no waiver clause in the General Terms applies (cl 43).

Dr Patterson's opinion

- 12.6 Dr Patterson provides his opinion as to the interpretation of his 2010 VDSL decisions. For the reasons above, it is inappropriate for Chorus to ask the then regulator to provide interpretation advice on his own decision, which is being criticised by parties.
- 12.7 He does not deal with most of the reasons why we have said, via the August submission and cross submission, and our last submission, that the 2010 decisions are wrong in concluding that VDSL is outside the STD.
- 12.8 As the Commission is considering whether there are grounds to litigate, it is reasonable to assume, in that context, that Chorus has no answer to those grounds
- 12.9 As to VDSL, Dr Patterson only addresses, at [1.9(j)] and [9.3]-[9.6], the Commission's legal advice that "the "maximum available downstream speed" service description anticipates the use of VDSL when it is available on a line and subject to the end users wishes.". He says that interpretation is not tenable, that the provision in the terms is designed to ensure that line speed is not "artificially configured at the DSLAM" and that, if new technologies were to be included, the STD would have included processes.
- 12.10 Dr Patterson's interpretation of his decision is incorrect:
 - (a) First he draws his conclusions that VDSL is excluded without dealing our various submissions.
 - (b) Submissions had already made that, on lines suitable for VDSL where VDSL is installed, a VDSL service has the maximum "line speed that the DSLAM can support". That can be the only interpretation of cl 3.7 as the words are unambiguous. The requirement in cl 3.7 is on what the DSLAM can support, not what the ADSL2+ card can support.
 - (c) The STD specifically covered new technologies at cl 3.28:

The Basic UBA Service is available where Chorus has ADSL or ADSL2+ (or other next generation type technologies) coverage
 - (d) Chorus has a choice not to release next generation technologies. When it chooses to, the STD applies to those technologies including VDSL.
 - (e) The above has been squarely raised in submission, so there is no surprise in this.
 - (f) Lack of a detailed process does not erode the unequivocal provisions. But in any event the process is simple. If there's a VDSL line card in the DSLAM, Chorus must make the VDSL service available. The STD works for this.

- (g) Providing the service only via the ADSL2+ class, in Dr Patterson's words, has "the line speed... artificially configured at the DSLAM", by providing only ADSL2+ maximum line speeds when the STD requires at cl 3.7 "The maximum upstream or downstream line speed that the DSLAM can support". That's what the DSLAM can support (including VDSL) not what the ADSL2+ card can support.

13. IPP pricing

13.1 Chorus and Dr Patterson point to the inconsistency between the IPP and the approach now taken against Chorus.

13.2 As outlined in our submissions, the s 30R IPP review is separate, and what happened there has no relevance to the issues here (which are based on the interpretation of the 2007 decision). They are irrelevant subsequent events. Two wrongs do not make a right.

13.3 The IPP is effectively corrected anyway on the FPP.

14. RSPs' letter to Commission

14.1 Dr Patterson in particular relies heavily on a letter from RSPs to Chorus dated 10 July 2013,¹⁴ said to concede that Chorus could impose a constraint at Handover Point.

14.2 However, even if the letter can be so interpreted:

- (a) It is irrelevant, as interpretation does not have reference to post-instrument events.¹⁵
- (b) In any event, it can only implicate Telecom, Orcon and CallPlus as the other RSPs, of which there are many, were not party to the letter.
- (c) Additionally end users and their representatives were not parties to the letter. The focus of the Act and therefore the STD is the end user.
- (d) In any event, the STD confirms that the RSPs do not waive their rights under the No Waiver clause (cl 43 of the General Terms).

14.3 We are not commenting on relevance of this to the good faith complaint, as that is outside the scope of this submission.

15. Chorus' changes this week

Introduction

15.1 For the second time in this investigation, Chorus has announced major proposed changes days before submissions are due, again with a changed course and confusing detail. While some things are to be welcomed – such as putting Boost HD on ice – there are signs that Chorus may not be being fulsome with the Commission, and that it is achieving the same sort of outcomes by a different, yet problematic, path (presumably because the first path is not working for them).

¹⁴ The 2007 date in footnote 19 of Dr Patterson's opinion should be 2010

¹⁵ The same applies to Chorus advice to RSPs noted at [2.14(c)] of Dr Patterson's opinion.

15.2 Whac-A-Mole.

15.3 In any event, Chorus has not ruled out any later changes and specifically says that it can limit regulated UBA speeds (and expects to limit them in the future).¹⁶ Thus the same issues are still live.

Dialogue document not fulsome

15.4 The Dialogue update states:¹⁷

Chorus has never proposed to “degrade” or reduce the broadband experience from today’s levels

15.5 That is not correct, on what is a key issue, and one that has been squarely raised in our earlier submissions. As we have said, what became apparent at the last Commission workshop is that Chorus specifically stated that it was going to de-prioritise Regulated UBA behind Boost at all the switches.

15.6 De-prioritisation has a major impact on regulated UBA QoS, thereby also driving regulated UBA customers onto Boost as regulated UBA deteriorates.

15.7 This is a major issue, squarely raised, and with substantial implications for RSP and consumers. This raises questions as to other aspects in the Dialogue document, produced so close to due date for submissions. In the short time available, and the lack of detail in the Dialogue update, it is difficult to submit further. As Chorus is misstating the position on such a key issue, what else is happening?

Regulated UBA including VDSL will be de-prioritised behind Boost VDSL?

15.8 The Dialogue update states at page 20, as to the new Boost VDSS service:

This is the service notified to the Commission and discussed throughout Commission workshops and dialogue sessions without any changes.

15.9 Prioritisation of Boost VDSL ahead of regulated UBA including regulated VDSL was part of the Boost services stated at the last Commission workshop. The implication is that prioritisation will continue to be a feature, thereby leading to reduced regulated UBA performance, and driving customers from regulated UBA to Boost.

15.10 If Chorus does not confirm that de-prioritisation will not happen, the regulated service is breached by de-prioritisation. See our last submission. In that event, Boost VDSL cannot be introduced.

15.11 Dr Patterson, in dealing with de-prioritisation, does not deal with most of the arguments in our earlier series of submissions concluding that there can be no de-prioritisation of regulated UBA relative to Boost. We do not agree with his opinion that the Commission’s legal advice on cl 3.25, as to not distinguishing UBA traffic from other traffic, is correct. As it happens, the traffic handed over to the RSP is likely to be separately tagged, and in any event incoming traffic (to the end user) will be clearly identified.

¹⁶ Dialogue update Page 20

¹⁷ At page 20

15.12 But Dr Patterson in the end takes a narrow interpretation without regard to context and purpose. The clause is about treating the traffic at the handover point in the same way and that excludes throttling.

Regulated VDSL connection and wiring charges

15.13 At the start of the Dialogue document, Chorus says it will apply a new charge of \$115 to cover a splitter, new Cat5e wiring and jackpoint install.

15.14 For the regulated VDSL service, we understand this \$115 is used as the basis to increase the amortised installation costs from \$5 to \$10 (page 23 of the Boost update).

15.15 Putting that in context, installation charges nearly double the monthly UBA price (that is, the \$10.92 is nearly doubled).

15.16 We have been informed that, currently when Chorus does such an install, it provides those services within the \$5. The ability of Chorus to, overnight, double its charge for the same thing strongly implies market power and a need for regulation, in relation to those charges (currently POA in the STD). If the issue cannot be resolved on the FPP, a quick s 30R could be undertaken as the price point selection is straightforward, as the IPP decision shows.

15.17 While not clear from page 23 of the Dialogue update, it seems likely that RSPs don't have to take the install service on an amortised basis and therefore can elect not to take the newly priced \$115 service. However, where the \$115 service is necessary to make VDSL function adequately, the problem (market power requiring regulation) remains.

15.18 It is not apparent whether the customers as at 1 December will have their charges lifted from \$5 to \$10. If they do, in relation to existing services with existing wiring, that could not be justified in any event.

Regulated VDSL

15.19 We dealt with this extensively in our last submission. As we said, Chorus must supply regulated VDSL and the 2010 decisions were incorrect; therefore Chorus cannot unilaterally set the terms of regulated VDSL as it has purported to do.

15.20 The Dialogue update does not solve this problem, and Chorus must make the service available on regulated terms; for example, it cannot retain the right to end the supply of regulated services on the happening of certain events, such as ending the service down a street when UFB is available. The STD does not permit this (and for good reason: copper competition for fibre is a fundamental part of the regulatory construct).

15.21 Chorus should confirm it will provide VDSL on the regulated terms. To continue to do otherwise would be to breach the STD, and the commitment to act in good faith (this is one of issues where the good faith obligation applies as it relates to the implementation of substantive terms: the point is now reached where Chorus, properly informed, would be aware that VDSL is a regulated service).

Additional charges, different handover points and charges, etc

15.22 RSPs had raised concerns about costs and realities around Boost and regulated handover points, and now there are to be some additional charges as well. In the limited time available, and in view of the limited information in the dialogue

update, it has not been possible to submit on this, But, given the way in which Chorus has been pursuing these matters, other parties would be understandably concerned as to the implications. These should be thoroughly addressed.

No material innovation

- 15.23 The Dialogue update continues the theme of saying that the Boost offering are innovative and are appropriate commercial variants. For the reasons given in earlier submissions by us and others, there is no material innovation.
- 15.24 In any event, Chorus needs to pursue any concerns it has down a different path, as we have noted in earlier submissions.

16. Good faith

- 16.1 As we note above and in our last submission, the good faith obligations have a role, but we have not focussed on them in this submission.
- 16.2 Chapman Tripp's opinion wrongly marginalised the good faith obligations in Cl 2 of the General Terms. They list in a schedule some detailed terms of a good faith nature, and describe cl 2 as having "an understandable degree of rhetoric", with the good faith duty being a "preamble" to the specific provisions that follow (seemingly the list of detailed terms in the schedule).¹⁸ Essentially they say the preamble becomes enforceable only via the detailed provisions.
- 16.3 If that was so, the good faith provision in cl 2 would have no point and no meaning. The provision is there for a legal purpose: to state a general good faith duty that is binding. There are specific variants on that duty. General obligations with parallel specific obligations are commonplace in instruments.
- 16.4 In any event the point is simply answered: the idea that this is just a preamble and rhetoric is not expressly stated. Thus the general good faith duty applies.
- 16.5 We accept that the meaning of good faith in this regulatory instrument may be different from that in contract but it is not necessary to analyse that in this submission. We doubt it is significantly different, however, given the widespread use of good faith duties (and related fiduciary duties) in law.
- 16.6 As we have earlier submitted, it may be that Chorus is breaching good faith duties (for example, in the manner that it is pursuing the Boost and regulated UBA services, which can be a breach of good faith, within the framework of the STD). The Commission (or a stakeholder on discovery) is able to get details of what is happening under the bonnet at Chorus, in terms of good faith, intentions etc.

¹⁸ Chapman Tripp 18 September 2014 Opinion at [37] and [39].