

**Chorus Limited**  
**Deed of Open Access**  
**Undertakings for Fibre Services**

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**Deed submitted by Chorus in accordance with section  
156AH of the Telecommunications Act 2001 on  
6 October 2011**

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## **Background**

These Undertakings are given by Chorus in accordance with, and are Undertakings for the purposes of Part 4AA of the Telecommunications Act 2001.

### **1 Definitions**

1.1 In these Undertakings, unless the context requires otherwise:

*Access Seeker* means a person who is obtaining, or has indicated to Chorus a desire to contract for, Services from Chorus.

*Access Seeker Confidential Information* has the meaning in clause 12.2.

*Act* means the Telecommunications Act 2001.

*Baseband* means a wholesale service supplied by Chorus that provides an analogue voice path from an End User premise to a handover point using any of a range of technologies.

*Board* means the Chorus board, and includes a committee of the Chorus board.

*Cellular Mobile Systems* means those systems that are:

- (a) used to provide, support and maintain a mobile radio system in which assigned radio spectrum can be re-used simultaneously in nearby geographic areas without interference between users; and
- (b) capable of supporting hand-off, of sessions or calls, between wireless transmitters;

Such systems include radio transmission systems, and any supporting infrastructure such as buildings, cabinets, poles, transmission systems and associated operational support systems.

*CEO* means the chief executive of Chorus.

*Central Office and POI Co-location Service* means a service which provides access to, and space in, Chorus central office facilities to enable Access Seekers to house equipment to deliver fibre services the specifications and terms of which are contained in a Reference Offer.

*CFH* means Crown Fibre Holdings Limited or any entity that inherits its legal rights and obligations.

*Chorus* means Chorus Limited.

*Chorus Related Party* means any entity that is a Related Party of Chorus.

*Commencement Date* means the later of:

- (a) the date on which the Minister's approval is notified in accordance with section 156AI(5) of the Act; and
- (b) Separation Day.

*Commercial Information* means information that is:

- (a) confidential; and
- (b) that is in respect of a Service, and is information regarding:
  - (i) service development;
  - (ii) pricing;
  - (iii) marketing strategy and intelligence;
  - (iv) service launch dates;
  - (v) costs;
  - (vi) projected sales volumes; and
  - (vii) network coverage and capabilities; and

but does not include:

- (c) any information that is not current and which has been superseded by identifiable new information or is more than 18 months old; or
- (d) any information, or types of information, that Chorus and the Commission agree in writing is not Commercial Information;

*Commission* has the meaning given to that term in the Act.

*Designated Access Service* has the meaning given to that term in the Act.

*Direct Fibre Access Service* means a point-to-point Layer 1 fibre access service the specifications and terms of which are contained in a Reference Offer.

*Discriminate* has the meaning in clause 5.2 and *discrimination* and *non-discrimination* have corresponding meanings.

*Downstream Service* means any Service that is a layer 3 or above service by reference to the OSI Model. For the avoidance of doubt, a Service is not a "layer 3 or above service" where it has layer 3 or above capabilities for the purpose of supporting or interfacing with Access Seeker networks or services.

**Example**

- (a) Chorus offers the Basic UBA service today over its copper network. This service uses a "Layer 2 Tunnelling Protocol" (L2TP) to connect the End User to the Access Seeker. The L2TP is carried over a TCP/UDP session between Chorus' LAC and the Service Provider's LNS (LAC and LNS are the two endpoints of a L2TP tunnel). The TCP/UDP session Chorus uses to connect the End User to the Access Seeker is considered a layer 3/4 protocol. Notwithstanding this the Basic UBA service is considered a Layer 2 service.
- (b) Chorus will offer a Layer 2 bitstream access service that reflects the requirements of the TCF Mass Market Fibre Service description. In order to connect with this service in a manner that enables the Access Seeker to easily manage end user identity, Chorus will provide the option to supply the Access Seeker with TR101 information embedded in DHCP or PPPoE traffic. To provide this function it is necessary for the Chorus Layer 2 service to be "layer 3 aware" and to interact with the layer 3 protocols, but Chorus is not actually providing the layer 3 service. If Chorus did not supply this option then some Access Seekers may have issues managing end user authentication and service management when taking the Layer 2 bitstream access service.
- (c) Another example is that the TCF Mass Market Fibre Service description requires for multicast that the Layer 2 service provided by Chorus is layer 3 aware. The layer 3 service is provided by the Access Seeker, not Chorus, but both services need to work together seamlessly to provide the TCF Multicast service (to support video services).
- (d) For an ATA based voice service it is necessary for the Chorus service to be application aware. However, it is still acts as a sub-layer 3 service in that it does not provide end to end client to server or client to client services as specified in the OSI model. These layer 3 functions would be provided by the Access Seeker.

*Employee* means a Chorus employee other than the CEO.

*End User* has the meaning given to that term in the Act.

*Equivalence* has the meaning in clause 6.3.

*Fibre-to-the-Premises Access Network* has the meaning given in Part 4AA of the Act.

*Government Initiative Agreements* means:

- (a) the RBI Contract;

- (b) the UFB Contract as executed on 24 May 2011.

*Government Initiative Service* means any service that Chorus is required to make available under a Government Initiative Agreement.

*Grandfathered Service* means:

- (a) any Mobile Service;
- (b) any service principally involving provision of space in any exchange, central office, cabinet, building or other facility except for:
  - (i) the Central Office and POI Co-location Service; or
  - (ii) any such service that is a Designated Access Service or Specified Service;
- (c) an input service to allow continued provision of One Office; and
- (d) the E3 link service,

that is provided by Chorus to an Access Seeker prior to the Commencement Date for the term of the relevant contract.

*Input Services* means the following Services:

- (a) the Direct Fibre Access Service;
- (b) the PON Fibre Access Service;
- (c) the Central Office and POI Co-location Service; and
- (d) any other unbundled Layer 1 service on any part of the Network that Chorus is required to provide:
  - (i) at 31 December 2019 under the UFB Contract; or
  - (ii) under a Standard Terms Determination.

*Internal Ordering* means order capture, order validation, order feasibility and order detailing.

*Layer 1* means layer 1 of the OSI Model, which is normally associated with passive network infrastructure.

*Layer 2* means layer 2 of the OSI Model, which is normally associated with active network infrastructure.

*Minister* has the meaning given to that term in the Act.

*Mobile Service* means:

- (a) services delivered predominantly by means of Cellular Mobile Systems, and which enable calls or communication sessions to be maintained when an End-User moves location, including moving between areas served by different wireless transmitters; and
- (b) services provided for the purpose of enabling a service described in (a) above such as site co-location, roaming, cell-site linking and backhaul.

*Network* means the Fibre-to-the-Premises Access Network which is, or will be, owned or operated by Chorus.

*Open Access Deed of Undertaking for Copper Services* means the deed containing undertakings given by Chorus in accordance with section 69XB of the Act.

*OSI Model* means the seven-layer model of network architecture known as the Open Systems Interconnection Model.

*PON Fibre Access Service* means a point-to-multipoint Layer 1 fibre access service the specifications and terms of which will be contained in a Reference Offer that will be produced by Chorus prior to the date on which Chorus is required to provide the service.

*PSTN* has the meaning given to that term in the Act.

*RBI Contract* means the Rural Broadband Agreement between the Crown and Telecom Corporation of New Zealand Ltd dated on or about 20 April 2011, as replaced, novated or amended from time to time.

*RBI Deed* means the deed containing undertakings given by Chorus in accordance with section 156AY of the Act.

*Reference Offer* means for a particular Service Chorus' template offer that contains sufficient terms to allow, without the need for an Access Seeker to enter another agreement with Chorus, the provision of that Service and must include a Wholesale Services Agreement.

*Related Party* means in relation to another person:

- (a) any company that is related within the meaning of section 4A(2)(a) of the Financial Reporting Act 1993; and
- (b) any partner or joint venturer of that person.

*Separation Day* means the day on which Telecom Corporation of New Zealand Limited distributes 100% of the ordinary shares it holds in Chorus to the holders of ordinary shares in Telecom Corporation of New Zealand Limited.

*Service* means a wholesale Telecommunications Service that is provided using, or that provides access to unbundled elements of, a Network.

*ServiceTel* means Telecom Corporation of New Zealand Limited.

*Sharing Arrangement* has the meaning given in subpart 2 of Part 2A of the Act.

*Specified Service* has the meaning given to that term in the Act.

*Standard Terms Determination* means a standard terms determination made by the Commission under section 30M of the Act.

*Sub-loop Backhaul Service* means the service described in the Standard Terms Determination dated 18 June 2009 for the Designated Access Service included in subpart 1 of Part 2 of Schedule 1 to the Act as unbundled copper local loop network backhaul (distribution cabinet to telephone exchange).

*Telecommunications Service* has the meaning given to that term in the Act.

*UBA Backhaul Service* means the service described in the Standard Terms Determination dated 27 June 2008 for the Designated Access Service included in subpart 1 of Part 2 of Schedule 1 to the Act as unbundled bitstream access backhaul service.



*UBA Service* means the service described in the Standard Terms Determination dated 12 December 2007 for the Designated Access Service included in subpart 1 of Part 2 of Schedule 1 to the Act as unbundled bitstream access service.

*UCLL Backhaul Service* means the service described in the Standard Terms Determination dated 27 June 2008 for the Designated Access Service included in subpart 1 of Part 2 of Schedule 1 to the Act as unbundled copper local loop network backhaul (telephone exchange to interconnect point).

*UCLL Service* means the service described in the Standard Terms Determination dated 7 November 2007 for the Designated Access Service included in subpart 1 of Part 2 of Schedule 1 to the Act as unbundled copper local loop network service.

*UFB Contract* means the Network Infrastructure Procurement Agreement between CFH and Telecom Corporation of New Zealand Ltd dated 24 May 2011, as replaced, novated or amended from time to time.

*Undertakings* means this deed.

*Wholesale Services Agreement* means an agreement between Chorus and an Access Seeker which sets out the general terms for the supply of Services by Chorus to that Access Seeker.

*Working Day* has the meaning given to that term in the Act.

## **2 Interpretation**

- 2.1 Examples used in these Undertakings are only illustrative of the clauses to which they relate. They do not limit those clauses. If an example and a clause are inconsistent, the clause prevails.
- 2.2 In these Undertakings, unless the context requires otherwise:
  - (a) clause headings are for convenience only, and are not part of these Undertakings;
  - (b) references to clauses are references to clauses in these Undertakings;
  - (c) the singular includes the plural and vice versa;

- (d) words denoting natural persons include any legal entity or association of entities and vice versa;
  - (e) reference to a statute means that statute as amended and includes subordinate legislation;
  - (f) except where these Undertakings expressly provide otherwise, reference to a document means that document as amended;
  - (g) reference to the agreement of a party means written agreement;
  - (h) reference to approval, authorisation or consent means prior written approval authorisation or consent;
  - (i) the words "including", "for example" or "such as" when introducing an example, do not limit the meaning of the Clause of the Undertakings to which that example relates.
- 2.3 Communications to and from a party may, if that party so agrees, be provided in electronic form.
- 2.4 References in clauses 6.7 and 8.1 these Undertakings to Chorus being *required to provide* a Service means a requirement to provide a Service under clause 6.2, a determination made under Part 2 of the Act, a registered undertaking given by Chorus under the Act or the UFB Contract. For the avoidance of doubt this clause 2.4 does not require Chorus to provide Access Seekers with a Service or in any way limit clause 7.1.

### **3 Scope and Application**

- 3.1 These Undertakings are binding on Chorus, are given by Chorus in favour of the Crown and are enforceable by the Crown and the Commission.
- 3.2 If anything in these Undertakings and anything in any agreement or arrangement in respect of Chorus or between:
- (a) Chorus and CFH;
  - (b) Chorus and any Access Seeker;
  - (c) Chorus and any Chorus Related Party,

are inconsistent, these Undertakings prevail in relation to the obligations of Chorus.

3.3 These Undertakings only apply to Chorus in New Zealand. For the avoidance of doubt, Chorus will not use this limitation to circumvent the intent of these Undertakings.

3.4 Nothing in these Undertakings requires Chorus to maintain separate business units. Accordingly (without limitation):

- (a) because Chorus will have no separate entities to place or receive internal orders or to issue or receive internal bills, Chorus is not required to put in place written arrangements or implement any Internal Ordering, charging or billing (creation of the billing record, sending a bill and making payment) related to the internal supply of any service. For the avoidance of doubt, as more particularly provided in clauses 6.2(b), 6.3 and 6.4, Chorus will use the same procedures as Access Seekers for provisioning, support and all other procedures not otherwise identified in this clause 3.4(a) (including inventory maintenance, scheduling and managing workforce, workforce orchestration, physical path allocation, logical resource allocation and network provisioning); and
- (b) because Chorus is a single integrated business, Chorus is not required to implement separate management and reporting lines; and
- (c) Chorus is not required to implement substantial upgrade or redesign of Chorus systems for the purposes of restricting access to any information by certain Employees. This clause 3.4(c) does not limit Chorus' obligation to comply with the information use and disclosure requirements set out in clauses 5.5, 6.3(d), 11 and 12. Chorus may comply with these requirements by, for instance, the implementation and enforcement of an employee code of conduct and information control policy as required by clauses 14.1 and 14.2 of these Undertakings.

3.5 If, in relation to any matter, the terms of these Undertakings and the terms of:

- (a) the RBI Deed are such that both deeds could give rise to obligations in respect of that matter, then the terms of the RBI Deed shall apply and the terms of these Undertakings shall not apply to the matter; and

- (b) the Open Access Deed of Undertaking for Copper Services are such that both deeds could give rise to obligations in respect of that matter, then, subject to clause 3.6, the terms of these Undertakings shall apply and the terms of the Open Access Deed of Undertaking for Copper Services shall not apply to the matter.
- 3.6 Notwithstanding clause 3.5, in all cases these Undertakings shall not apply to the following services (even though they may fall within the definition of a Service):
- (a) the UBA Backhaul Service;
  - (b) the UCLL Backhaul Service;
  - (c) the Sub-loop Backhaul Service;
  - (d) Baseband; and
  - (e) any service delivered over the Network that is only available in conjunction with a service regulated by the Open Access Deed of Undertaking for Copper Services.
- 3.7 For the avoidance of doubt, the UCLL Service and UBA Service are not Services for the purposes of these Undertakings and these Undertakings do not apply to those services.

#### **4 Commencement, Term and Variation**

- 4.1 These Undertakings commence on the Commencement Date.
- 4.2 These Undertakings may be only varied in accordance with the process set out in sections 156AL and 156AM of the Act.

#### **5 Non-discrimination**

- 5.1 When doing or omitting to do anything in respect of a Service Chorus will not Discriminate:
  - (a) between Access Seekers;
  - (b) in favour of any Chorus Related Party; or
  - (c) where Chorus supplies a Service to itself, in favour of Chorus itself.

As of Separation Day the only Service that Chorus will be supplying to itself will be the Direct Fibre Access Service. Chorus will be using the Direct Fibre Access Service as an input into point to point Layer 2 fibre services. Both the Direct Fibre Access Service and the point to point Layer 2 fibre service are defined in agreements between CFH and Chorus.

The service description, price and non-price terms for the Direct Fibre Access Service have been commercially agreed between CFH and Chorus as part of a competitive tender process. Chorus will publish a Reference Offer for the Direct Fibre Access Service in accordance with the CFH/Chorus arrangement. Prior to 1 January 2020 the non-discrimination standard applies to the Direct Fibre Access Service, in the manner specified in clause 5.3 and Schedule 1. From 1 January 2020 the Direct Fibre Access Service will be supplied to the Equivalence standard.

- 5.2 In these Undertakings, "to Discriminate" means to treat differently, except to the extent a particular difference in treatment is objectively justifiable and does not harm, and is unlikely to harm, competition in any telecommunications market.
- 5.3 Compliance with the requirement in clause 5.1(c) not to Discriminate in relation to the Direct Fibre Access Service may be evidenced by the standards set out in Schedule 1.
- 5.4 For the avoidance of doubt the following differences in treatment are objectively justifiable and do not harm, and are unlikely to harm, competition in any telecommunications market consistent with clause 5.2:
- (a) In relation to any Government Initiative Service:
- (i) Chorus providing a service that is technically or functionally the same as a Government Initiative Service (but that Chorus is not required to provide under the Government Initiative Agreement) on terms and conditions (including price) that are different to those on which a Government Initiative Service is provided in accordance with the terms of the Government Initiative Agreement; or
- (ii) Chorus not making Government Initiative Services available (for whatever reason) more widely than is required by the terms of the Government Initiative Agreement.

**Example**

Under both the RBI Contract and UFB Contract Chorus is required to make available certain services to Access Seekers supplying priority users (such as schools in certain areas) on preferential terms. Clause 5.4(a) ensures that Chorus is able to offer the preferential terms as agreed with the Crown to achieve the Crown's social policy objectives without compromising Chorus' compliance with its open access undertakings.

- (b) In relation to Grandfathered Services:
  - (i) Chorus providing a service on terms and conditions (including price) that are different to those on which a Grandfathered Service is provided; or
  - (ii) Chorus not making Grandfathered Services more widely available (for whatever reason) than they are at the Commencement Date.

5.5 Chorus will provide Commercial Information to Access Seekers on a non-discriminatory basis.

## 6 Equivalence

6.1 Chorus will ensure that the design and build of the Network (in areas in which Chorus has been selected as a UFB partner) enables Access Seekers to purchase the Input Services on an Equivalence basis on and after 1 January 2020. In doing so:

- (a) It is acknowledged that Chorus and CFH have agreed to design and build a Network in a way that achieves the outcome described in clause 6.1; and
- (b) Chorus will consult with the Commission in July 2015 on the design and build of the Network for the purpose of informing the Commission as to how Chorus and CFH have agreed to meet the obligation in clause 6.1. Chorus will take into account any feedback received from the Commission.

Chorus and CFH have agreed in the UFB Contract to design and build the Network, for the candidate areas in which Chorus is a UFB partner, in a way that enables Equivalence in relation to the supply of Input Services to be achieved on and after 1 January 2020, which is the objective of clause 6.1.

In other candidate areas other UFB partners are responsible for Equivalence design and build.

When considering annual certification pursuant to clause 10 of this Undertaking, prior to 2020 consideration will be given by Chorus to the progress made towards delivering the obligation in clause 6.1.

6.2 Subject to clause 6.7, from 1 January 2020, Chorus must:

- (a) make available the Input Services; and
- (b) provide all Input Services to the Equivalence standard.

- 6.3 In this Undertaking "*Equivalence*" means that if Chorus is required to provide Access Seekers with an Input Service under clause 6.2, it must do so on an equivalence of inputs basis, meaning:
- (a) Chorus must provide itself and the Access Seekers with the same Input Service;
  - (b) Chorus must deliver that Input Service to itself and the Access Seekers on the same timescales and on the same terms and conditions (including price and service levels);
  - (c) Chorus must deliver the Input Service to itself and the Access Seekers by means of the same systems and processes (including operational support processes);
  - (d) Chorus must provide its own business operations and the Access Seekers with the same Commercial Information about that Input Service, and those same systems and processes; and
  - (e) when providing that Input Service to itself, Chorus must use systems and processes that Access Seekers are able to use in the same way, and with the same degree of reliability and performance.

6.4 In clause 6.3, *the same* means exactly the same, subject to:

- (a) trivial differences;
- (b) differences that reflect the fact Chorus is a single business and is not required to maintain separate business units as more particularly set out in clause 3.4, including relating to:
  - (i) credit requirements and vetting;
  - (ii) payment;
  - (iii) provisions relating to the termination of supply;
  - (iv) provisions relating to dispute resolution (to the extent necessary because Chorus is one company);
- (c) differences relating to:

- (i) requirements for a safe working environment; and
  - (ii) matters of national and crime related security, physical security, security required to protect the operational integrity of the network, or any other security requirements agreed by Chorus and the Commission;
- (d) differences that are identified after the Commencement Date and that are agreed by Chorus and the Commission in writing where those differences are not inconsistent with "equivalence" (as that term is defined in Part 4AA of the Act) having regard to the purpose statement in section 156AC of the Act; and
- (e) differences relating to terms required by a residual terms determination under subpart 2A of Part 2 of the Act.

6.5 In this clause 6, "Chorus itself" includes any Chorus Related Parties which acquire an Input Service from Chorus.

6.6 For the avoidance of doubt, clause 6.1 does not limit clause 6.2.

6.7 Where Chorus is required to provide a new Input Service to the Equivalence standard, to recognise the practical implementation issues associated with development of a new service Chorus and the Commission may agree a reasonable time period during which, and reasonable conditions on which, any failure by Chorus to deliver that new Input Service to the Equivalence standard will be treated as trivial or de minimis for the purposes of clause 16.1 in the context of the launch and ongoing provision of the new Input Service.

Chorus will need a reasonable time period to ensure any new Input Services is available to the Equivalence standard. Where a new Input Service is required to be made available shortly before 1 January 2020, it may not be possible to ensure that the new service meets the Equivalence standard from that date as required by clause 6.2. In these situations, clause 6.7 provides that Chorus and the Commission may agree that, subject to reasonable conditions, for a reasonable time period any failure to deliver the new service to the Equivalence standard will be treated as trivial or de minimis for the purposes of clause 16.1.

## **7 Supply of service**

7.1 Subject to clause 6.2, nothing in these Undertakings requires Chorus to provide Access Seekers with a Service.



Chorus may be required to provide a Service under a determination made under Part 2 of the Act, a registered undertaking given by Chorus under the Act or the UFB Contract. These Undertakings regulate certain aspects of how those services are supplied but does not impose the obligation to supply itself. The one exception is clause 6.2, where this Undertaking imposes the obligation on Chorus to supply the Input Services from 1 January 2020.

- 7.2 On and from the Commencement Date, where Chorus offers and provides Services to Access Seekers, it must do so in accordance with these Undertakings.
- 7.3 For the avoidance of doubt, further terms and conditions of supply, including any eligibility requirements or other obligations of the Access Seeker, may be provided for in agreements between Chorus and CFH, and Chorus and each Access Seeker.
- 7.4 Chorus will comply with the line of business restrictions set out in sections 69O and 69S of the Act.
- 7.5 Without limiting clause 7.4, Chorus will not supply any Access Seeker with a Downstream Service except where Chorus is expressly permitted or required to supply a Downstream Service by any law or regulation.

## **8 Disclosure of service terms**

- 8.1 Where Chorus is required to provide a Service it will produce a Reference Offer for that Service unless the terms on which Chorus must provide the service are set out in a Standard Terms Determination.
- 8.2 Chorus must publicly disclose (including on a website owned or controlled by Chorus) all Reference Offers not later than 10 Working Days after the Service to which the Reference Offer relates is available on those terms and conditions.
- 8.3 Any variations or additions to a Reference Offer, or terms on which Chorus has agreed to supply a Service subject to a Standard Terms Determination that differ from those set out in the Standard Terms Determination, will likewise be publicly disclosed within 10 Working Days.
- 8.4 Any Wholesale Services Agreement entered into by Chorus with an Access Seeker on terms that are different from the terms of the standard Wholesale Services Agreement contained in a Reference Offer, and any variation or addition to such a Wholesale Services Agreement, is a variation to a Reference Offer for the purposes of clause 8.3.

- 8.5 Chorus may with the consent of the Commission withhold public disclosure of terms and conditions under clause 8.2 or clause 8.3:
- (a) at the request of an Access Seeker which is not a Chorus Related Party;  
or
  - (b) which Chorus considers on reasonable grounds to be commercially sensitive or confidential.
- 8.6 Where Chorus or an Access Seeker makes a request to the Commission for consent to withhold any information from public disclosure under clause 8.5, if the Commission has not given notice to Chorus granting or declining consent before the relevant deadline for disclosure then Chorus' obligation to disclose does not operate until it has received notice from the Commission.

## **9 Self reporting, complaints and investigation**

- 9.1 Chorus will disclose any material breach of these Undertakings to the Commission as soon as is reasonably practicable (but in any event not later than 20 Working Days) after Chorus becomes aware of that breach. Within 10 Working Days of the end of the first quarter following the Commencement Date Chorus will disclose to the Commission any non-material breach of these Undertakings that occurred in that quarter and that Chorus is aware of, and thereafter within 10 Working Days of the end of each quarter any non-material breach of these Undertakings that Chorus has become aware of since the last report. All disclosures under this clause will be in sufficient detail to reasonably inform the Commission of the nature, cause and extent of the breach.
- 9.2 Where the Commission has reasonable grounds to believe that there has been a breach of these Undertakings, or where the Commission has received a complaint from any Access Seeker concerning Chorus' non-compliance with these Undertakings, the Commission may on request in writing (which will include details of the potential breach), and Chorus will supply to the Commission within a reasonable period of time, such information as is relevant to support its assessment of Chorus' compliance with these Undertakings. The Commission may request information under this clause without revealing the identity of any complainant.
- 9.3 Where the Commission requests information under clause 9.2, the Commission may require any information or report required pursuant to these Undertakings

to be provided by Chorus by a time, in a form and manner as reasonably required by the Commission.

## **10 Certification**

10.1 No later than 20 Working Days following the end of each Chorus financial year the Board of Chorus must certify to the Commission annually on behalf of Chorus that, to the best of the directors' knowledge after making reasonable inquiry, Chorus has complied with these Undertakings (except for any breaches that have been reported to the Commission or are reported with the certificate).

## **11 Commercial Information**

11.1 Chorus will:

- (a) prior to 1 January 2020, disclose Commercial Information relating to the Direct Fibre Access Service to Access Seekers on a non-discriminatory basis; and
- (b) from 1 January 2020, disclose Commercial Information relating to Input Services to Access Seekers in accordance with Equivalence.

11.2 For the purposes of these Undertakings, information is not "provided" or "disclosed" by Chorus to ServiceTel where the information is provided to ServiceTel in accordance with an arm's length Sharing Arrangement.

## **12 Confidentiality**

12.1 Where the Commission has accepted an application from an Access Seeker in accordance with clause 12.3, at any time when Services are supplied to an Access Seeker the following provisions shall apply to the supply of those Services:

- (a) Chorus will keep all Access Seeker Confidential Information in confidence and will not disclose Access Seeker Confidential Information to any third party other than as necessary for the provision of the Services to that Access Seeker.
- (b) Chorus will not use the Access Seeker Confidential Information for sales or marketing purposes.

- (c) Chorus will make and enforce internal rules and policies to ensure compliance with the obligation in this clause 12.1.
- (d) A disclosure of Access Seeker Confidential Information will not constitute a breach of these Undertakings where it is:
  - (i) in confidence, to an emergency organisation that reasonably needs that information;
  - (ii) properly made pursuant to a relevant legal or regulatory obligation;
  - (iii) to the Commission;
  - (iv) in confidence to CFH as required by a written agreement between Chorus and CFH that has been disclosed to the Commission; or
  - (v) properly and reasonably made to a court.
- (e) A disclosure or use of Access Seeker Confidential Information will not constitute a breach of these Undertakings where and to the extent that such disclosure or use is authorised by the Access Seeker.

12.2 In these Undertakings *Access Seeker Confidential Information* means any information that:

- (a) an Access Seeker provides to Chorus in relation to the provision of a Service; or
- (b) Chorus otherwise holds or obtains in relation to the provision of a Service to an Access Seeker,

that is by its nature confidential or proprietary, is disclosed in confidence or which Chorus knows or ought reasonably to know is confidential to that Access Seeker, or that concerns a person that is, or intends to become, a customer or End User of that Access Seeker; but does not include:

- (c) information that was publicly available or known to Chorus at the time of receipt, or that becomes publicly available other than as a result of a breach of confidentiality;

- (d) information that was obtained by Chorus from sources that are independent of the Access Seeker;
- (e) information that is required to be disclosed by Chorus by law;
- (f) information, or types of information, that Chorus and the Commission agree is not Access Seeker Confidential Information; and
- (g) information, or types of information, that an Access Seeker agrees is not Access Seeker Confidential Information.

12.3 Clause 12.1 does not apply to the supply of Services:

- (a) pursuant to a Standard Terms Determination;
- (b) under a commercial arrangement with an Access Seeker for the supply of Services that contains appropriate protections for confidential information belonging to Access Seekers which are consistent with standard industry practice, unless:
  - (i) the Access Seeker applies to the Commission in writing for the application of clause 12.1 and
  - (ii) the Commission agrees that it is appropriate that clause 12.1 apply instead of the commercial arrangement

in which case the provisions of clause 12.1 will apply in substitution for the confidential information protections in the commercial agreement and those terms are of no effect.

### **13 Breach of these Undertakings**

13.1 These Undertakings will be enforced in accordance with sections 156AQ to 156AS of the Act.

### **14 Internal Compliance and Audit**

14.1 Chorus will not later than 2 months after the Commencement Date:

- (a) prepare a code of conduct for Employees in relation to these Undertakings (or include matters relating to these Undertakings in a wider Employee code of conduct);

- (b) ensure that a copy of the code of conduct is available on Chorus' intranet and internet sites;
- (c) provide annual training on these Undertakings for all Employees; and
- (d) conduct an annual survey to assess Employee awareness of these Undertakings.

14.2 Chorus will not later than 3 months after the Commencement Date provide to the Commission a draft information control policy, and following consultation with the Commission implement an agreed information control policy that sets out what is required of Employees in order to comply with:

- (a) the relevant confidentiality obligations contained in commercial arrangements in place with Access Seekers for the supply of Services; and
- (b) the restrictions on the use of Commercial Information relating to Input Services set out in clause 11;

14.3 The information control policy required by clause 14.2 will include:

- (a) a description of the purpose of the policy;
- (b) a description of consequences of breach of these Undertakings;
- (c) the training and communication that will occur within Chorus;
- (d) rules on disclosure, use and access to Commercial Information relating to Input Services;
- (e) specific rules on information disclosure, use and access for persons in roles that have multiple functions; and
- (f) handling and storage of confidential information belonging to Access Seekers.

14.4 Chorus will develop within 6 months of the Commencement Date, in consultation with the Commission and Access Seekers, key performance indicators by which it may be judged whether Chorus is complying with clauses 5 to 8 (inclusive) of these Undertakings.

14.5 Every 3 months after the Commencement Date, Chorus will:

- (a) publish a report on the key performance indicators developed in accordance with clause 14.4; and
- (b) survey Access Seekers on whether they are aware of any non-compliance with clauses 5 to 12 (inclusive).

14.6 For the avoidance of doubt, Chorus can publish additional key performance indicators at any time.

14.7 Chorus will conduct internal audits of:

- (a) the effectiveness of the information control policy required under clause 14.2 to address Chorus' confidentiality and Commercial Information obligations and this may include controls or methodologies, where appropriate, to measure the effectiveness of the policy; and
- (b) the controls and methodology used to measure and report on the key performance indicators required under clause 14.5(a),

every six months in the first year after the Commencement Date and annually thereafter.

14.8 The Commission may request a copy of any audit report prepared under clause 14.7. The Commission will treat the audit report as commercially confidential, and will not disclose the audit report.

14.9 Chorus and the Commission will hold quarterly meetings for the purpose of discussing Chorus' compliance with these Undertakings.

## 15 **Force Majeure**

15.1 A "force majeure event" is any:

- (a) act of God, fire, earthquake, storm, tornado or flood;
- (b) strike, lockout, work stoppage or other labour hindrance;
- (c) explosion, collision or nuclear accident;

- (d) sabotage, riot, civil disturbance, insurrection, epidemic, national emergency (whether in fact or law) or act of war (whether declared or not) or terrorism;
- (e) the failure of any equipment, materials, services or supplies provided to Chorus by any other person;
- (f) unavoidable accident; or
- (g) other event beyond the reasonable control of Chorus; but

does not include:

- (h) loss of supply of any essential services where such loss of supply is caused by Chorus' action or negligence;
- (i) any event which Chorus could have prevented or overcome by the exercise of reasonable diligence and at reasonable cost; or
- (j) any lack of funds for any reason.

15.2 If Chorus fails, or believes it might fail, to meet an obligation under these Undertakings because of a force majeure event, it will:

- (a) give notice to the Commission of the event and the likely effect of the event as soon as is reasonably practicable after it becomes aware of the event;
- (b) in the case of an anticipated failure, continue to meet the obligation for as long as possible; and
- (c) following the failure, do all it reasonably can to meet the obligation as soon as is practicable.

15.3 Chorus will not be in breach of these Undertakings if it fails to meet an obligation under these Undertakings to the extent that, and for as long as, such failure is the result of a force majeure event.

## 16 Miscellaneous

16.1 Chorus will not be in breach of these Undertakings if it fails to meet a requirement of these Undertakings and the failure to comply is trivial or de minimis.



16.2 Subject to clauses 3.2 and 3.5, nothing in these Undertakings limits any obligation of Chorus, the Board, the CEO, an Employee, a Chorus agent or a Chorus contractor to comply with any law that is binding on, or applies to, that person or Chorus, or prevents such compliance.

## **SCHEDULE 1**

### **APPLICATION OF NON-DISCRIMINATION TO THE DIRECT FIBRE ACCESS SERVICE**

Clause 5.1(c) of these Undertakings requires, among other things, that Chorus not Discriminate in relation to the provision of the Direct Fibre Access Service to Access Seekers and the use by Chorus of the same service as an input to a point-to-point Layer 2 fibre service. Clause 5.3 provides that compliance with the requirement in clause 5.1(c) may be evidenced by the matters set out in this Schedule.

#### **Price**

- 1.1 Where Chorus uses the Direct Fibre Access Service as an input to a point-to-point Layer 2 fibre service, Chorus will satisfy its non-discrimination obligation in clause 5.1(c) in relation to price if Chorus provides the Direct Fibre Access Service and point-to-point Layer 2 fibre service at prices equal to:
  - (a) the price caps in the UFB Contract as executed on 24 May 2011 (including the agreed schedule of changes to those price caps); or
  - (b) the prices set out in a Standard Terms Determination in place for either the Direct Fibre Access Service or point-to-point Layer 2 fibre service.
- 1.2 If Chorus does not price either the Direct Fibre Access Service or point-to-point Layer 2 fibre service (or both) in accordance with clause 1.1 above, for the purposes of assessing whether the Direct Fibre Access Service pricing meets the non-discrimination requirement:
  - (a) it must be assumed that the point-to-point Layer 2 fibre service price is built up from the Direct Fibre Access price; and
  - (b) Chorus will keep a record of the costs incurred over and above the price of the Direct Fibre Access Service when providing the point-to-point Layer 2 fibre service, including the costs of individual components.
- 1.3 For the avoidance of doubt the records required to be kept by Chorus under clause 1.2(b) of this Schedule 1 do not constitute a "written arrangement" for the purposes of clause 3.4(a).

**Non price**

- 1.4 It must be assumed that the point-to-point Layer 2 fibre service is built up from the network elements of the Direct Fibre Access Service provided to Access Seekers.
  
- 1.5 The key performance indicators developed in accordance with clause 14.4 will provide evidence whether or not there is process discrimination in relation to the Direct Fibre Access Service.